92-1032

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC.; and WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.

Petitioners

v.

DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a federal court of appeals evade the mandates of the Seventh Amendment and Erie Railroad v. Tompkins, 304 U.S. 64 (1938), simply because its decision is rendered in an opinion marked "NOT FOR PUBLICATION"?

Did the Court of Appeals exceed its appellate jurisdiction by rendering a decision which: (1) redetermines the case in a manner inconsistent with the jury's verdict and in contravention of the Seventh Amendment and Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); (2) negates the jury's verdict, that plaintiff had incurred and assumed the risk of his injury by his dive, and mandates a new trial in which the defendants will bear the risk of full liability consequent to plaintiff's dive on the "injury on rescue

not on dive" theory advocated by plaintiff but rejected by the jury; (3) fails to grant to the District Court the deference required for its considerable discretion in formulating jury interrogatories; (4) reverses a valid judgment on the basis of a ruling that the District Court actually did not make; (5) requires a new trial based upon dispositive legal principles formulated by the Court of Appeals contrary to those established by controlling law; and (6) invented testimony not provided by the plaintiff's expert on a crucial element of plaintiff's claims?

May a federal appellate court in a diversity case create its own version of the evidence, the facts, and the law, in contravention of the record, the jury's verdict, and established precedents, to grant its appellant a new trial?

When controlling state law in a diversity case places the burden of establishing apportionment or separate injuries on the party claiming apportionment or separate injuries, may a federal appellate court shift that burden to those who make no such claim?

When a jury has expressly found that the plaintiff assumed the risk of his injury, and that finding is supported by the evidence and untainted by reversible error, may a federal appellate court grant a new trial in which the risk of plaintiff's injury is shifted from the plaintiff to the defendants?

When the jury's verdict necessarily embraces a finding that plaintiff sustained his injury during his dive when his head struck the bottom of the pool rather than during the subsequent rescue, may a federal appellate court order a new

trial to determine whether the injury occurred not at impact in the dive but during the subsequent rescue?

When the trial record plainly shows that a party was permitted to present an issue for the jury's resolution, may a federal appellate court grant that party a new trial on the ground that the party had not been permitted to present the issue?

LIST OF PARTIES

The caption of the case contains the names of all parties currently involved in this case. KDI Corporation and KDI Sylvan Pools, Inc. are not listed, because they have been dismissed.

Petitioners, who were defendants in the District Court and appellees in the Court of Appeals have been collectively referred to as "the Benasa defendants" or "Benasa" in the lower courts and in this petition. Respondent Dennis Mooney was the plaintiff in the District Court and the appellant in the Court of Appeals, and this petition continues the references to him as "plaintiff" or "Mooney". Respondents MLA Management Associates, Inc. and Mountain Leisure Associates were defendants in the District Court and appellees/cross-appellants in the Court of Appeals. This

petition continues the references to them collectively as MLA. The Corporate parties have no unlisted parent companies, subsidiaries or affiliates.

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REFERENCE TO REPORTS OF DECISIONS BELOW

The opinions of the Court of Appeals and of the District Court have not been published, but may be found in the separately bound appendix to this petition, starting at pages 1 and 42, respectively.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals is dated August 31, 1992 (86-88).[1] The Court of Appeals denied petitioners' timely petition for rehearing by its order dated September 29, 1992 (89-91).

This is a timely petition for writ of certiorari, filed within 30 days of the order denying rehearing, Rule 20 of the Rule of the United States Supreme Court. This Honorable Court may review the judgment of the Court of Appeals by

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[1]The numerical references are to the pages of the separately bound appendix to this petition.

writ of certiorari pursuant to 28 U.S.C. §1254(1). This Honorable Court has broad supervisory powers over the judgments of lower federal courts, United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950), may reverse a Court of Appeals and reinstate a District Court judgment, Gibson v. Lochheed Aircraft Service, 350 U.S. 356, 367 (1956), and, in the exercise of such jurisdiction, must see to it that the waters of justice are not polluted, Mesarosh v. United States, 352 U.S. 1, 13 (1959).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of the common law."

Section 1652 of the United States Judicial Code, 28 U.S.C. §1652, provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."[2]

STATEMENT OF THE CASE

A. Jurisdiction of the Lower Courts

The District Court had jurisdiction pursuant to 28 U.S.C. §1332(a) by virtue

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[2]The "laws of the several States" include the judicial decisions of the states' highest courts, Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555 (1949).

of the amount in controversy in excess of the required amount and the diversity of citizenship between plaintiff and the defendants. The Court of Appeals, had jurisdiction over the appeals from the District Court's final order and judgment by virtue of 28 U.S.C. §1291.

B. Statement of Facts

Concluding a lengthy and expensive trial,[3] at which plaintiff Dennis Mooney contended that he had made only a shallow "racing" dive into the defendants' swimming pool and that his irreversible quadriplegia was either caused by the defendants' negligence in maintaining or marking the pool's water depth, or was caused when he was rescued, and the

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[3]The trial began on Monday, November 19, 1990, and ended on Wednesday, November 28, 1990, generated a 1,030-page transcript, and cost plaintiff $122,100 according to his attorneys' post-trial affidavits (64); defense expenses raise this total much higher.

defendants countered that plaintiff's quadriplegia happened when his head hit the bottom of the pool and that plaintiff had caused and had assumed the risk of his injury by making a running, nearly vertical dive contrary to his training and experience, the jury returned its verdict by answering the first two special interrogatories, in which they found that the defendants had proven that the act of diving into the pool involved a risk knowingly assumed by plaintiff. The District Court entered judgment for the defendants and rejected plaintiff's motion for a new trial.

Plaintiff then appealed, contending that the District Court erred by admitting deposition excerpts to be read by MLA's attorney, by allegedly foreclosing his "injury on rescue" theory from the jury's consideration, and by

placing on him, rather than the defendants, the burden of proving his claim that he sustained two injuries, an incomplete injury at impact and a complete quadriplegic injury at rescue. In a "NOT FOR PUBLICATION" opinion filed on August 31, 1992, a Panel of the Court of Appeals rejected plaintiff's claim that he was entitled to a new trial "on liability for the dive" because of the deposition excerpts read at trial by counsel for MLA (31), but agreed with plaintiff's arguments "that there was adequate evidence in the record to support a discrete negligent rescue claim, and conclude[d] that the failure to submit it to the jury was prejudicial error" (5). Believing that the negligent rescue claim had been foreclosed from the jury's consideration and that "The jury should, however, have been able to

consider separately the question whether there was a negligent rescue, the risk of which the plaintiff did not assume", (25) the Panel decided to remand the case "for a new trial on the negligent rescue claim against the Benasa and MLA defendants" (40).

In reaching the decision in question, the Panel opinion proceeded on the misbeliefs that the District Court precluded plaintiff from presenting his "exacerbation by rescue" claim to the jury, and that plaintiff had introduced evidence factually sufficient for that claim. The Panel opinion also misapprehended or overlooked these crucial points of law and fact: 1) the threshold issue common to plaintiff's "negligent rescue" claim rejected by the jury and to the "assumption of the risk" defense found by the jury was whether or

not plaintiff's permanent quadriplegia resulted when plaintiff executed a dive that caused that injury at impact with the pool bottom; 2) the District Court did not preclude plaintiff from pursuing his negligent rescue claim to the jury, and plaintiff did present that claim to the jury; 3) the District Court properly exercised its discretion in formulating the jury's special interrogatories; 4) the jury's verdict rejects plaintiff's negligent rescue claim as a matter of established fact; 5) the Panel opinion reviews and effectively negates the jury's verdict in a manner inconsistent with the Seventh Amendment and with its duties as a federal appellate court; 6) as the proponent of apportionment or aggravation, plaintiff had the burden of proving to the jury's satisfaction his contention that his permanent

quadriplegia resulted not from the impact of his body with the bottom of the pool, but from the manner in which he was rescued; 7) the testimony of plaintiff's expert Dr. Kaplan failed to provide a factual basis for the jury to find that plaintiff suffered two injuries, an incomplete spinal injury at impact with the pool bottom and a complete spinal injury during his rescue, or to find that the alleged incomplete injury was not as totally disabling as the complete injury; and 8) the Panel's mandate unconstitutionally upsets an unassailable jury verdict and requires a new trial controlled by principles contrary to established law.

Noting that plaintiff "argues that the district court committed error by refusing to allow Mooney to argue his case as involving separate theories of

liability" (5), the Panel opinion holds "that there was adequate evidence in the record to support a discrete negligent rescue claim, and conclude[s] that the failure to submit it to the jury was prejudicial error" (Id.). The District Court, however, did not preclude plaintiff from submitting his negligent rescue claim to the jury. In mischaracterizing the case as one in which the District Court dismissed and foreclosed jury consideration of plaintiff's "spine board" claim (14), the Panel opinion completely ignores the record, which shows that, although the defendants posited that "it may very well be that it is irrelevant to even argue about it at this point to the jury" (223) and that "the issue of the spine board and lack of use of the spine board should not be argued to this jury" (226), the

District Court explicitly ruled that "I will allow that to remain in the case" (227). Contrary to mistaken belief of the Panel opinion that the District Court sustained defendants' arguments to dismiss (14), the District Court actually rejected defendants' arguments to dismiss plaintiff's rescue claim (221-228). While the Appendix submitted to the Court of Appeals Panel did not contain plaintiff's closing argument to the jury, a review of that transcript reveals that plaintiff's attorney did in fact argue the negligent rescue claim to the jury (215-220).

Although the District Court accurately determined that plaintiff's evidence was inadequate "on separating the injury" and "on which the jury could differentiate the damages" (221), the District Court nevertheless drafted

special jury interrogatories "to put [plaintiff's rescue claim] to the jury in a reasonable and responsible fashion" (Id.), an approach that did in fact "include all of the acts in the concept of negligence, even the concept of comparative negligence and assumption of the risk will work properly, in my judgment, since the guard's conduct would not have happened at all without the Plaintiff's initial conduct" (222).

The District Court's approach allowed the parties to present all of their claims and defenses (except for the emergency and Good Samaritan defenses), and properly focused the jury's attention on the threshold factual issues: the type of dive that plaintiff executed, the injury that that dive inflicted, and plaintiff's appreciation of the risk of that injury. Plaintiff contended and

argued to the jury that he had executed a shallow racing dive and was rendered a complete quadriplegic by the defendant's rescue without the spine board. The defendants proved, however, that plaintiff had executed a nearly vertical dive that produced an impact at the bottom of the pool which shattered plaintiff's cervical spine and caused immediate quadriplegia, an injury which plaintiff voluntarily assumed. The jury was free to accept or reject the parties' respective contentions under the District Court's approach.

The Panel opinion also fails to grant to the District Court the deference for its considerable discretion in formulating jury interrogatories as mandated by cases such as In re Merritt Logan, Inc., 901 F.2d 349, 367 (3rd Cir. 1990), McNally v. Nationwide Ins. Co.,

815 F.2d 254, 266 (3rd Cir. 1987), Healey v. Catalyst Recovery of Penna., Inc., 616 F.2d 641, 648 (3rd Cir. 1980), and DeEugenio v. Allis-Chalmers Mfg. Co., 210 F.2d 409, 414 (3rd Cir. 1954). Had the Panel opinion granted the proper deference, it would have found that the interrogatories were not unfair simply because they did not specifically embrace a particular theory, Merritt Logan, and that the causation issues were subsumed in the interrogatories, McNally, Healey.

Although "acknowledging that the testimony of Dr. Kaplan as to the cause of Mooney's injury was, at times, opaque" (18; emphasis added), the Panel opinion nevertheless discerns "from his testimony a clear indication of his belief that Mooney suffered two distinct injuries: a compression injury, resulting from the impact of the initial dive, and a flexion

injury, resulting from the manner in which Monahan rescued Mooney" (19). The Panel Opinion declares, without citation to the record, that "Kaplan distinguished between the compression injury, which the dive caused, and the flexion injury, which fragmented the bones and irreversibly damaged the spinal cord" (Id.). Unfortunately, there is nothing in the record to support the Panel's declaration.

What the Panel misrepresents as two distinct injuries was actually described by Dr. Kaplan as the two components of the same injury that occurred when plaintiff's head struck the bottom of the pool. On direct examination, plaintiff's attorney asked Dr. Kaplan to assume that plaintiff "received an injury when his head contacted the bottom of the pool" (112; emphasis added), and inquired "what

happens, what happened to his neck, what is the mechanism of the injury, both as to the bone and to the surrounding structures supporting the bone, what happens?" (Id.). The Panel Opinion ignores the focus of the question upon the contact at the bottom of the pool, and Dr. Kaplan's response describing a single injury at that moment:

> "Well, the injury is that there is both impression, that's a vertical loading force down, and flexion to cause the bones to be comminuted in one area more than the other, to fragment one side more than the other, and the spinal column, excuse me, the spine cord, the major nerve wires inside have been in some way compromised" (Id.; emphasis added).

Instead of the two separate injuries from two separate forces invented by the Panel, Dr. Kaplan's testimony, like that of the defense expert, actually delineated a single spinal cord injury produced by the coincidence of the

compressive and flexion forces generated when plaintiff's head hit the bottom of the pool, causing, inter alia, plaintiff's C-4 vertebra to break off a piece of his C-5 vertebra and wedge it between the C-4 and C-6 vertebrae mechanically traumatizing and disrupting the spinal cord in a C-6 complete nerve injury (180-203). The following detailed, chronological review of Dr. Kaplan's testimony reveals that he provided no factual basis for plaintiff's "aggravation" claim or for the Panel opinion.

Dr. Kaplan was qualified (94) and offered (102) by plaintiff as an expert in rehabilitative medicine with respect to spinal injuries, and he acknowledged that: he had no engineering degree (98); had no degree in radiology and was not a radiologist (Id.); was not licensed as a

neurologist or as an orthopedic surgeon (98-99); had no biomechanical engineering degree (99); and was not a physicist, a mechanical engineer or the plaintiff's treating physician (Id.).

Dr. Kaplan stated that he had broken his neck and had sustained an "incomplete" spinal injury when he was seventeen years old (93). Dr. Kaplan explained that a "complete" spinal injury is one in which there is no motor or sensory function existing after 24 hours, and that an "incomplete" spinal injury is one in which there is some motor or sensory function extant after 24 hours after the accident (115), and he gave himself as an example of an incomplete spinal injury (115-116). Dr. Kaplan did not, however, relate the circumstances of his injury: how it occurred, what was done for him, whether his bones were

broken or whether his spinal cord was severed or injured; and he never compared those circumstances with the circumstances of plaintiff's injury.

While Dr. Kaplan stated that he was able to place a person within the general categories of complete and incomplete spinal injuries, he admitted that it is "very difficult to predict" the future of an incomplete spinal injury, that the "function can be anything from partial to complete recovery", and that "each case then becomes a very individual matter" (116). At no time did Dr. Kaplan explain whether plaintiff's theoretical incomplete injury would have resulted in a partial or a complete recovery, nor did he explain to what degree plaintiff would have remained disabled had a spine board been used.

When Dr. Kaplan examined plaintiff

in connection with his January 25, 1990 report, in which, as even plaintiff's counsel agreed, he was of the opinion that plaintiff had sustained an immediate spinal cord injury not a removal injury (175), Dr. Kaplan concluded that plaintiff's injury was a complete spinal injury (117). At this juncture the questions and answers quoted by the Panel opinion occurred:

> "Q. Okay. Now, Doctor, I want you to assume that no spine board was used in removing this man from the pool. Are you able to express an opinion regarding whether or not the failure to use a spine board was a significant factor in making him a complete spinal injury?
>
> "A. Yes, I am.
>
> "Q. What is that opinion?
>
> "A. I believe that it was a significant factor in making him a complete injury.
>
> "Q. When you say, 'I believe', is that speculative or with reasonable medical certainty?
>
> "A. That is with reasonable medical

certainty.

"Q. And by the words, 'I believe,' you mean that it's your opinion?

"A. Yes." (117-118)

Within both the primary question and the conclusionary, non-factual opinion is the assumption that the impact with the pool bottom produced only an incomplete spinal injury. At no point in Dr. Kaplan's testimony did he state that the initial injury was only incomplete and not complete, and he did not give the factual bases, if any, for this opinion.

On cross-examination by the Benasa attorney, Dr. Kaplan read the emergency room report and the Bellevue Hospital Center history (163-166). Nothing in this examination provided the jury with a factual basis to find that plaintiff had sustained only an incomplete spinal injury when he struck the bottom of the pool. On the contrary, the emergency

room report related "spinal cord injury with quadriplegia due to C-5 compression fracture without significant subluxation" (165), and the Bellevue record related "The patient is a 20 year old white male who hit the bottom of a swimming pool at 5:00 p.m. after dive and became immediately quadriplegic" (166).

None of those deficiencies was cured by the detailed cross-examination of Dr. Kaplan by counsel for MLA (167-207). Rather, that testimony elicited further confirmation of the defense contention that plaintiff rendered himself a permanent quadriplegic when his neck fractured as he hit the bottom of the pool. Dr. Kaplan confirmed that the defendant's expert's conclusion, that the cervical spine injury is the direct result of the diving accident, was consistent with the Bellevue report of

immediate quadriplegia at that moment (174). Dr. Kaplan stated that "The nerve injury would be described as C-6 complete" (180; emphasis added).

In fine detail, Dr. Kaplan confirmed the fractures of the bones of plaintiff's neck and the mechanism of injury which traumatized the spinal cord due to the flexion and compression forces developed when plaintiff hit the bottom of the pool (180-203). Although Dr. Kaplan also confirmed that plaintiff's neck became unstable because the ligaments were also damaged by the contact with the bottom of the pool, he never stated that this instability caused the quadriplegia. Dr. Kaplan admitted that he did not know whether the flexion preceded the compression or whether plaintiff was changing the position of his head when he impacted the bottom of the pool, because

this was beyond Dr. Kaplan's filed of expertise.

On redirect examination, plaintiff's attorney elicited the concept of "spinal shock" to suggest that the emergency room report of immediate quadriplegia was premature (211), but Dr. Kaplan admitted that the term "does not speak to the issue of whether it is complete or incomplete" (211-212) and that the emergency room report indicates when the paralysis began (Id.). Nothing on redirect examination provided a factual foundation for plaintiff's contrary proposition that the paralysis began later during the rescue attempt. Dr. Kaplan did not provide a factual basis for plaintiff's "aggravation" claim, contrary to the Panel opinion.

Claiming that "nothing in Pennsylvania jurisprudence suggests that

plaintiff's inability to apportion damages deprives that plaintiff of a remedy" (22), the Panel Opinion holds that "plaintiff must merely show that there were, in fact, two separate causes" (22-23) shifting the burden "to the defendants to show which defendants had caused what percentage of Mooney's injuries" (23). The Panel opinion notes that "Although Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976), relied on by defendants, might lead to a different result, Huddell turns on New Jersey law, and hence is inappropriate in this case, which is governed by Pennsylvania law" (24, n.6). On these points, the Panel Opinion invents its own law, contrary to controlling Pennsylvania law, and departs from its mandate to decide cases in accordance with the Court of Appeals' own precedents and prevailing state law, and

in the process depriving the appellee of equal protection of the law, Eric R. Co. v. Tompkins, 304 U.S. 64, 75, 58 S.Ct. 817, 820-1 (1938); 28 U.S.C. §1652.

Although it cites and purports to follow Martin v. Owens-Corning Fiberglas Corp., 515 Pa. 377, 528 A.2d 947 (1987), the Panel Opinion ignores and contradicts the basic rule, stated in Martin, that "the burden of proving apportionment rests on the party seeking it", 528 A.2d at 949. The Panel opinion also does not mention and conflicts with the prior opinion of the Court of Appeals in Borman v. Raymark Industries, Inc., 960 F.2d 327, 331 (3rd Cir. 1992), which echoed that "'[T]he burden of proving apportionment rests on the party seeking it.' Martin II, 515 Pa. at 382, 528 A.2d at 949 (citing Restatement (Second) of Torts §433B(2))." See also,

Bryant v. Girard Bank, 358 Pa. Super. 335, 517 A.2d 968, 975 (1986)(under §433(B)(2) the burden of proof is on the party seeking apportionment); Wade v. S.J. Groves, 283 Pa. Super. 464, 424 A.2d 902, 907 n.2 (1981)(same).

In placing upon defendants the burden "to avoid full liability by apportioning damages and showing that they are responsible only for a given portion of plaintiff's damages" or showing "which defendants had caused what percentage of Mooney's injuries" (23), the Panel opinion, which provides no precedent for its declaration, contradicts established law.

In practical effect, the Panel opinion also negates the jury's verdict by compelling a new trial where the defendants bear the risk of "full liability" consequent to plaintiff's

dive, even though the jury has already determined that plaintiff himself assumed the risk of his injury, and guarantees plaintiff a full recovery because the defendants can do no more, under the Panel opinion's restrictions, than "show which defendants had caused what percentage of Mooney's injuries". The Panel opinion was not free to view or redetermine the case in a manner inconsistent with the jury's verdict, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780 (1962). But the Panel opinion does just that by failing to recognize that the jury reached its verdict only because it found that plaintiff rendered himself a permanent quadriplegic when his head hit the bottom of the pool, and then by remanding for a new trial that ensures plaintiff of the recovery to which the

jury has said he is not entitled, and on the "injury at rescue" claim that the jury rejected.

Furthermore, contrary to the declaration of the Panel opinion, Pennsylvania jurisprudence has long recognized that a plaintiff who is unable to prove his or her aggravation of injury claim is not entitled to a verdict on that claim. Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A. 745 (1936), cited in Martin, 528 A.2d at 949, and in Pavorsky, 148 A.2d at 103, but overlooked by the Panel opinion, represents a clear instance in which a plaintiff received no remedy beyond the scope of medical testimony, because "If the doctor were not in a position to make an estimate of the extent of the aggravation in point of time, the jury should not have been allowed to hazard a

guess beyond the period shown with reasonable certainty", 185 A. at 747.

In addition, the Panel opinion's disregard of Huddell v. Levin as inapposite to cases governed by Pennsylvania law, conflicts with the prior published opinions rendered by the Court of Appeals in Habecker v. Clark Equipment Co., 942 F.2d 210, 214 (3rd Gir. 1991), and in Roe v. Deere and Co., 855 F.2d 151, 153 n.2 (3rd Cir. 1988), which held that Huddell is applicable to cases governed by Pennsylvania law. Application of the Huddell approach to a case in which the plaintiff claims damages for "second collision" injuries or for aggravated injuries or for damages beyond those sustained by conduct for which the defendants are not responsible is consistent with the basic rule that the burden of proving apportionment or

aggravation is accorded to the party invoking it. Application of those principles by the Panel in this case would have affirmed the judgment that the Panel now vacates because plaintiff failed to provide the jury with sufficient facts to find that his injury was exacerbated on rescue and that his subsequent losses were greater than those that would have flowed from the initial injury at the bottom of the pool, for which he alone has properly been held responsible.

ARGUMENT

This Honorable Court should issue a writ of certiorari to review and reverse the new trial mandate of the Court of Appeals and to reinstate the judgment of the District Court, because the Court of Appeals so far departed from the accepted and usual course of judicial proceedings

as to call for the exercise of this Honorable Court's power of supervision.

Although required to follow controlling state law, the Court of Appeals departed diametrically from it. Although state law placed the burden of proof on the plaintiff, the Court of Appeals placed it on the defendants. Although required to construe the evidence in favor of the jury's verdict and to uphold the jury's verdict in the absence of prejudicial error, the Court of Appeals invents and emphasizes evidence contrary to the jury's verdict and sets the jury's verdict aside simply because the Court of Appeals thought that the jury's result was wrong. Although the Court of Appeals believed that plaintiff's negligent rescue claim had been dismissed, the record shows unquestionably that the claim was not

dismissed but rather was presented to but rejected by the jury. Although the Court of Appeals purports not to grant a new trial on the jury's verdict "on liability for the dive", its decision completely undermines the jury's verdict, which plead such liability exclusively on plaintiff, by ordering a new trial to shift that responsibility to the defendants.

Had the Court of Appeals followed the accepted and usual course of judicial proceedings by applying rather than contradicting established state law, by respecting rather than negating the jury's verdict, and by adhering to rather than creating its own record, the Court of Appeals would and should have affirmed the judgment of the District Court entered pursuant to the jury's verdict in the defendants' favor.

CONCLUSION

For these reasons, the Benasa appellees respectfully ask that this Honorable Court issue a writ of certiorari to the Court of Appeals, reverse the decision of the Court of Appeals granting a new trial, and reinstate the jury's verdict and the District Court's judgment.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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I. OPINION OF THE COURT OF APPEALS

NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5738 and 91-5782

DENNIS MOONEY,

Appellant in No. 91-5738

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres County, Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.; SYLVAN POOLS, INC.; KDI CORPORATION; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES Country CLUB, INC.; MLA MANAGEMENT ASSOCIATES INC.; MOUNTAIN LEISURE ASSOCIATES, INC.; WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.; KDI SYLVAN POOLS, INC.

WILD ACRES LAKES PROPERTY &
HOMEOWNERS ASSOC.

Third-party plaintiff

FIRST EASTERN BANK, N.A. BENASA REALTY COMPANY; BENASA HOLDINGS, INC. BENASA INVESTMENTS, INC.

Third-party defendants

BENASA REALTY COMPANY t/a Wild Acres d/b/a Wild Acres t/a Wild Aces Country Club, Inc. d/b/a Wild Acres County Club, Inc. t/a Wild Acres Inc. d/b/a Wild Acres Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.

Third-party plaintiffs

v.

MOUNTAIN LEISURE ASSOCIATES, INC.

Third-party defendant

MLA Management Association and Mountain Leisure Associates, Inc., Appellants in No. 91-5782

On Appeal From the United States Court of Appeals
For the Middle District of Pennsylvania
(D.C. Civ. No. 89-00068)
District Judge: Honorable Richard P. Conaboy

Argued: March 31, 1992

Before: BECKER, COWEN and ROTH, Circuit Judges

AUG 31 1992

OPINION OF THE COURT

BECKER, Circuit Judge.

Plaintiff Dennis Mooney was rendered a quadriplegic in a tragic swimming pool accident. He subsequently brought suit against the operators of the Pocono Mountains resort community in whose pool he was injured and the company that installed the pool. Mooney now appeals from an order of the district court denying his motion for a new trial following a verdict for the defendants.

Mooney proceeded at trial on two theories. First, he maintained that the defendants were negligent in failing to provide adequate warning about the depth of the pool area into which he dove. Second, he contended that the incomplete spinal injury that he suffered as a result of the dive became a complete spinal injury when a lifeguard

negligently removed him from the pool without using an available spine board.

The district court declined to permit the jury to consider the negligent rescue claim separately from the issue of liability resulting from the dive because, the court held, the plaintiff had failed to adduce sufficient evidence to differentiate or "apportion" liability between the two claims. The court therefore submitted the case to the jury on a unitary negligence theory with a set of special interrogatories.

In response to the special interrogatories, the jury stated that plaintiff had assumed the risk of injury by diving into what he knew to be a shallow pool. Because the case was tried on a unitary theory, the jury found against Mooney without being required to answer other interrogatories. Mooney

appealed, and now argues that the district court committed error by refusing to allow Mooney to argue his case as involving separate theories of liability. We agree that there was adequate evidence in the record to support a discrete negligent rescue claim, and conclude that the failure to submit it to the jury was prejudicial error. We also conclude that Mooney did not wave the negligent rescue claim by his counsel's reference to the critical events as "one continuous act." We will thereforereverse and remand for a new oral on the negligent rescue claim.

In contrast, we will affirm the district courts grant of summary judgment to defendants KDI, Sylvan Pools, which manufactured and installed the pool, based on the courts determination that recovery against KDI was precluded by the

Pennsylvania Statute of Repose.

Mooney also seeks a new trial with respect to his claim based on the initial dive. He urges that the court unfairly prejudiced his claim by erroneously admitting certain depositions at trial. The court permitted the depositions of three of Mooney's friends, who had accompanied him to the resort, to be read at trial in lieu of live testimony. The court allowed reading from the depositions because counsel for defendant Mountain Leisure Associates, operator of the resort, represented that subpoenas had been served on these witnesses who had ignored them, rendering them "unavailable." That representation was false, as subpoenas had not, in fact, been served on any of the three witnesses. Mooney alleges that permitting the reading of the depositions

was error and that the error prejudiced him because he could not cross-examine the witnesses whose testimony was arguably damaging to his credibility. For several reasons, however, we conclude that the admission of the deposition testimony, if error, was harmless and did not deprive Mooney of a fair trial. We therefore hold that the district court did not abuse its discretion in declining to grant a new trial on that basis.

Although it had held that MLA's counsel's misstatement did not warrant a new trial, the district court did find that the misrepresentation reflected "abject bad faith." It thereupon imposed a sizeable sanction upon MLA, which is challenged on a cross-appeal. Because of procedural deficiencies affecting the award of sanctions, including the absence of an adequate hearing, we will vacate

the sanctions order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

The facts, taken in the light most favorable to the verdict winners, the defendants, see Andrews v.City of Philadelphia, 895 F.2d 1469, 1479 (3d Cir. 1990), are as follows. On July 12, 1987, Mooney, in company with several friends, entered the Wild Acres Country Club. Shortly thereafter, he removed his outer clothing and ran toward the shallow end of the pool. Although the lifeguard, Brian Monahan, apparently hollered to him to stop running and not to dive, Mooney continued, and dove into the pool without pausing in his run. Although Mooney had apparently attempted to make a flat racing-type dive, the physical evidence of injury adduced at trial demonstrated that he dove vertically. Although the

pool had a four-feet marker in the area, the water was only three feet, two inches deep, and plaintiff struck his head on the bottom of the pool, causing serious injury to his spine.

The crux of Mooney's case was that he dove in large part because he was misled by the depth marker. Mooney's expert diving witness testified that an additional foot of water depth would have been of great importance in averting the diving injury. Mooney testified that he had observed the four-foot marker before making his dive and that he would not have made the dive had he known the water was only three feet deep. Defendants, however, maintained that plaintiff displayed a reckless state of mind by running toward the pool in knowing disregard of the lifeguard's command and without even noticing the depth marker.

They also established that Mooney was an experienced swimmer and diver, with lifeguard training, that he had been visiting the resort for many years, and that he was familiar with the pool.

Defendants also sought to prove that Mooney was a trespasser who was not entitled to warnings because he did not own property at Wild Acres country Club and had not formally been given the required guest badge by a property owner. Although he had come to the pool with pool members, the evidence showed that neither a "badge checker" nor any lifeguard (some of whom knew him) had prohibited plaintiff's entry into the pool area.

Largely in regard to this trespass issue, defendants were permitted by the district court to read from the depositions of three of Mooney's friends,

Patty Fitzpatrick, Matthew Siracuse and Kevin McDonald. These witnesses testified about the absence of a guest badge and also about Mooney's swimming and diving expertise and his familiarity, with the Wild Acres pool. Mooney argues that this testimony was used effectively to impeach his credibility by contradicting him on certain matters, including his guest status and his familiarity with the depth of the pool, and to demonstrate that he had special knowledge and training which made him particularly aware that the type of dive he made was dangerous.

The district court allowed counsel for defendant MLA Management Associates (MLA)[1] to read the depositions because

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[1]. There are two MLA defendants in this lawsuit, Mountain Leisure Associates, Inc. and MLA Management Associates. The district court imposed the sanction against MLA Management Associates, Inc.,

counsel had represented to the district court over a period of several days that each of the witnesses Fitzpatrick, Siracuse and McDonald -- had been served with a subpoena but nevertheless failed to appear in the courtroom. MLA does not dispute that this representation was false although MLA does dispute that it was knowingly false.

There is no doubt that by the time Mooney left Wild Acres he was suffering from permanent quadriplegia. He contends, however, that the sequela of the dive itself was only an incomplete spinal injury. Mooney maintains that lifeguard Monahan negligently rescued him by failing to use an available spine board and by failing to take other precautions required by the lifeguards

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and we refer to that defendant when we use the abbreviation "MLA."

Red Cross training, and that this negligent conduct increased plaintiff's injury from an incomplete and partially reversible paralysis to the condition of permanent quadriplegia which will confine him to a wheelchair for the rest of his life. This theory was advanced through the testimony of Dr. Richard Kaplan, an expert in physical medicine and rehabilitation. After giving the jury an "anatomy lesson," Dr. Kaplan explained the difference between incomplete and complete spinal injury,[2] and opined that the failure to use the spine board, which he explained immobilizes the spine after initial injury thereby preventing further

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[2]. Kaplan explained, from the vantage point of the incomplete spinal injury he himself had sustained as a teenager, the difference between a complete spinal injury -- one in which motor and sensory functions are permanently lost -- and an incomplete one where recovery may be either partial or full.

injury, was a "significant factor" in causing plaintiff to sustain a complete spinal injury.

Defendants responded with expert testimony that the dive itself produced an irreversible injury which alone was responsible for plaintiff's permanent quadriplegia. Under this view, the process of removing plaintiff from the pool caused no additional harm.

After the close of evidence, defendants argued that plaintiff's claim for the aggravation of his injuries should be dismissed because he had failed to prove an "apportionment" of harm between the original diving injury and the rescue. The district court agreed, and submitted only one overall claim of negligence instead of plaintiff's proposed jury interrogatories and his proposed points for charge which would

have presented the discrete negligence claim and to the jury and would have informed the jury that plaintiff's claim for the aggravation caused by the negligent rescue was not subject to the defense of assumption of the risk. The jury, disposed of the case by answering the first interrogatory and finding that in making his dive plaintiff had "assumed the risk." The Jury therefore never reached the other interrogatories.

In dealing with various post-trial motions, the district court found that counsel for MLA was guilty of misconduct in repeatedly misrepresenting that the three witnesses whose depositions were read had been served with subpoenas. It ordered defendant MLA to pay partial attorneys fees to Mooney in the amount of $20,350.00 (representing one-sixth of the putative cost of the trial) because of

the misconduct, observing that such a step was necessary to prevent "untoward implications for the future".[3] The court did not specify the doctrinal basis of the award, that is, whether it derived from inherent power or from 28 U.S.C.A. § 1927 (1992 Supp). The court, however, declined to order a new trial on the basis of the admission of the deposition testimony, concluding that it did not influence the jury's assumption of the risk finding. It also concluded that it had not erred in allowing the jury to use assumption of risk to reject Mooney's claim for injuries caused by the allegedly negligent rescue because Mooney had failed to meet his burden of proving

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[3]. The court reasoned that because there were six defendants, Mountain Leisure Associates was responsible for one-sixth of the legal fees that plaintiff incurred in relation the trial.

a "reasonable basis" for the "apportionment" between damages caused by the original injury and damages caused by the subsequent negligent rescue. These cross appeals by Mooney and MLA followed.

II. DISCUSSION

A. Negligent Rescue

Mooney contends that he is entitled to a new trial at least on the theory that lifeguard Monahan's rescue of him was negligent and converted his Incomplete spinal injury into a complete spinal injury. There is no dispute that Pennsylvania recognizes a second cause of action for negligent rescue. See Pavorskv v. Engels, 410 Pa. 100, 188 A.2d 731, 733 (1963). In formulating his argument that he is entitled to recover under this separate theory, Mooney relies on the testimony of his expert, Dr. Kaplan. Mooney argues that Kaplan's testimony

substantiated the theory, that the negligent rescue converted his injury to a complete spinal injury and that the testimony provided a sufficient "roadmap" for the jury to apportion damages between the two injuries. The defendants respond by pointing out the weaknesses in Dr. Kaplan's testimony and to the testimony of their expert, who opined that Mooney's injuries were solely caused by his initial dive into the pool. We must decide whether Kaplan's testimony did, indeed, provide a sufficient basis under Pennsylvania law on which the jury could have apportioned damages between the two theories of liability.

1. **The Testimony of Dr. Kaplan**

We begin by acknowledging that the testimony of Dr. Kaplan as to the cause of Mooney's injury was, at times, opaque.

Nevertheless, we discern from his testimony a clear indication of his belief that Mooney suffered two distinct injuries: a compression injury, resulting from the impact of the initial dive, and a flexion injury, resulting from the manner in which Monahan rescued Mooney. Kaplan distinguished between the compression injury, which the dive caused, and the flexion injury, which fragmented the bones and irreversibly damaged the spinal cord. The following colloquy concluded Dr. Kaplan's distinction between the compression injury and the flexion injury:

> Q. Okay. Now, Doctor, I want you to assume that no spine board was used in removing this young man from the pool. Are you able to express an opinion regarding whether or not the failure to use a spine board was a significant factor in making him a complete spinal injury.
>
> A. Yes, I am.
>
> Q. What is that opinion?

A. I believe that it was a significant factor in making him a complete injury.

Q. When you say, "I believe," is that speculative or is that with reasonable medical certainty?

A. That is with medical certainty.

Thus, there was, a trial, the opinion of a medical expert that Mooney had in fact suffered two separate injuries and that the latter injury converted his condition from one of incomplete spinal injury, where he might have regained some lower body function, to one of definite quadriplegia.[4]

2. Basis for Apportionment

Nevertheless, the district court refused to submit the theory of negligent rescue to the jury because it found that

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[4]. We acknowledge that defendants adduced contrary evidence, but that would not deprive plaintiff of a jury issue.

there was no basis in the record for apportioning damages between the two injuries, and that Mooney, as plaintiff, had not carried his burden under Pennsylvania law. See Martin v. Owens-Corning Fiberglass, 515 Pa. 377, 528, 20 A.2d 947 (1987) (requiring apportionment of damages between causes of injury to prevent cases going to the jury on pure conjecture). In so doing, the district court misapprehended Pennsylvania law with regard to apportionment of damages between defendants.

Where a plaintiff's injury is attributable to multiple causes, the Pennsylvania Supreme Court has held that, if there is to be apportionment, the Jury must be given some guidance as to how to apportion. See Martin, 528 A2d at 950-51. The district court in this case interpreted this apportionment rule as

precluding recovery if a plaintiff is unable to apportion damages between the causes and, hence, defendants. This was error for two reasons. First, nothing in the Pennsylvania jurisprudence suggests that plaintiff's inability to apportion damages deprives that plaintiff of a remedy. In Martin, where neither plaintiff nor defendants had apportioned the damages with sufficient specificity, the court remanded for a new trial on damages because the damages awarded plaintiff were "far below even a conservative estimate of the damages established at trial." Id at 951. In remanding, the court implied that if the defendants could not apportion plaintiff's damages between his emphysema and asbestosis, plaintiff was entitled to a full recovery. A plaintiff must merely show that there were, in fact, two

separate causes for his injury.

Second, in cases when a plaintiff proves that there were, in fact, two separate causes for his or her injury, the burden shifts to the defendants to avoid full liability by apportioning damages and showing that they are responsible only for a given portion of plaintiff's damages. See Restatement (Second) of Torts, § 433 (B) (2) (1965).[5] After Mooney adequately demonstrated that he had, in fact, suffered two separate injuries, the burden shifted to the defendants to show which defendants had caused what

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[5]. The Pennsylvania Supreme Court adhered to the Restatement position on apportionment in Martin, see 528 A2d at 949, and we believe it is an accurate prediction that it would do so with regard to the burden of proof as well.

percentage of Mooney's injures.[6]

The district court, on post-trial motions, also claimed that Mooney's counsel waived the theory of negligent rescue in consenting to allow the case to be tried on a "unitary" theory, which hypothesized that the injury was one continuous incident. After carefully reviewing the record, we conclude that nothing suggests that he was or that the district court thought that he was waiving a claim. We therefore find no waiver of the claim.

Because of the manner in which the case was submitted to the jury, when the jury affirmatively answered the interrogatory regarding assumption of

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[6]. Although Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976), relied on by defendants, might lead to a different result, Huddell turns on New Jersey law, and hence is inappropriate in this case, which is governed by Pennsylvania law.

risk, its answer completely interred plaintiff's case. The jury should, however, have been able to consider separately the question whether there was a negligent rescue, the risk of which the plaintiff did not assume. Mooney is, therefore, entitled to a new trial on the theory that the MLA and Benasa defendants were negligent in their rescue. In short, the district court, having committed a legal error which we cannot say is highly probably harmless, See McQueeney v. Wilmington Trust Co., 779 F.2d 916, 927 (3rd Cir. 1985), abused its discretion in refusing to grant a new trial. We will remand for a new trial on the theory of negligent rescue.

B. The Alleged Misrepresentations About "Unavailable" Witnesses

In contrast, we cannot say that the district court abused its discretion in declining to grant a new trial because of

the false representations of counsel for MLA with respect to the unavailability of the three witnesses and the reading of their depositions into the trial record. A number of factors support this conclusion.

1. **Absence of Prejudice**

For three reasons, we believe that the admission of the deposition testimony did not prejudice Mooney. First and foremost, Mooney has not made any colorable proffer as to how the three witnesses live testimony would have differed from their deposition testimony. Although plaintiff has suggested at least four ways in which their testimony damaged plaintiff's claim, he does not suggest that their live testimony would have been any different.

Second, most of the deposition testimony was entirely consistent with

other evidence in the case and the uncontradicted physical evidence about the dive. It was undisputed that Mooney was an experienced swimmer with lifeguarding experience and that he was familiar with the Wild Acres pool. Although the depositions bolstered that conclusion, they said little different from what Mooney himself had said at trial.

Third, we do not believe that the jury's finding that Mooney assumed the risk of injury related at all to the deposition testimony. The only disparity related to plaintiff's "guest" status, which went to the issue of whether Mooney had trespassed. That issue, however, is legally irrelevant to whether Mooney assumed the risk of harm from his dive, and plaintiff therefore suffered no identifiable prejudice from it.

Although, in some cases involving trespassers, the duty to warn is relaxed, here the judge's charge on assumption of risk isolated the two issues, and the court gave no instruction on a lessened duty to warn. We must presume that the jury followed the judge's instructions and therefore find no prejudice.

Nevertheless, Mooney contends that he suffered a generalized prejudice because his testimony was inconsistent with that of his friends, and defense counsel emphasized some of those inconsistencies as being relevant to Mooney's credibility. We acknowledge that Fitzpatrick's deposition testimony that Mooney was not her guest contradicted his direct testimony. We do not believe, however, that Mooney's credibility was relevant to the jury's verdict. Overwhelming evidence unrelated

to Mooney's credibility supported the finding that he had assumed the risk of injury. The lifeguard and Mooney himself testified that he had run towards the pool. Further, Mooney's own testimony detailed his sophistication in diving and swimming, as well as his familiarity with the pool.

2. **Availability of Witnesses to Plaintiff**

Mooney does not dispute the defendants' contention that he could have reached these friendly witnesses by telephone and asked for time to produce them, which the district court would likely have granted under the circumstances. In our view, his failure to do so suggests that his counsel decided, as a trial tactic, that he had not suffered sufficient prejudice from the admission of their deposition

testimony to merit the effort.

We also note that plaintiff's counsel had ample opportunity to question these witnesses at the deposition (even though not to conduct a "trial-type cross-examination", the absence of which he bemoans), and could have brought out any facts favorable to plaintiff.[7]

3. Conclusion

For all of these reasons, we agree with the defendants that any error in admitting the depositions was harmless under the highly probable standard of McQueeney, 779 F.2d at 927. Therefore,

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[7]. We note that we do not consider the putative misconduct of plaintiff's trial counsel relevant here. Plaintiffs have not yet established such misconduct yet. Even if they had, the determination whether depositions were introduced as the result of misconduct does not affect the decision whether to grant a new trial. Any abuse can be remedied by sanctioning either the parties or their attorneys.

the court did not abuse its discretion in deciding not to grant a new trial on liability for the dive because of the erroneous readings of the depositions.

C. **The Statute of Repose Issue**

The district court granted summary judgment in favor of the KDI, Sylvan defendants on the basis of the Pennsylvania statute of repose for improvements to real property, 42 Pa. C.S.A. § 5536 (Purdon, 1981). That statute bars actions for personal injuries against persons who are involved in the construction of real property improvements if such actions are commenced more than twelve years after the improvement was completed.

Application of the statute requires that three conditions be met. First, more than 12 years must have elapsed between completion of the improvement and

the injury. Second, the allegedly defective item which caused the injury must qualify as an improvement to real property. Third, the defendant must qualify as a member of the class of persons protected by the statute. Luzadder v. Despatch Oven Co., 834 F.2d 355, 358 (3rd Cir. 1987); McCormick v. Columbus Conveyor Co., 522 Pa. 520, 564 A.2d 907 (1989).

The first and third requirements are unquestionably met here. KDI Sylvan constructed the pool at Wild Acres in 1969, well over twelve years before this accident. There is also no dispute that the Sylvan defendants were involved in the actual construction of the pool. Mooney argues that the second requirement is not met, however, because, he contends, improvement to real property" only applies to "industrial structures"

and "heavy machinery."

We disagree. The pool constructed at Wild Acres was intended to be and was an improvement to real property. The pool is constructed in the ground, of concrete, reinforced with steel. It measures 45' x 100' and covers 6,500 square feet. The work involved in constructing the pool included excavating the site, pouring the concrete and installing the steel concrete reinforcement, installing plumbing to supply water to and drain water from the pool, installing filters, laying tile and painting.

To suggest that such construction is not an improvement to real property is frivolous. While there may be no Pennsylvania appellate court cases on point, we predict that the Pennsylvania Supreme Court would hold that the pool

described above is an improvement to real property. The district court was therefore correct in granting summary judgment to the KDI, Sylvan defendants based on the statute of repose.

D. **The Sanctions Issue**

The district court sanctioned MLA because its attorney falsely represented to the court that subpoenas had been served on Siracuse, McDonald, and Fitzpatrick, thereby allowing him to argue that the witnesses were unavailable within the meaning of FRCivP 32. The court found that MLA (or its counsel) had "shown bad faith, . . . encompass[ing] factual misrepresentations." We hold that the attorneys fee sanction imposed against MLA must be vacated and remanded for three reasons.

First, the doctrinal basis of the district court's attorneys fees award is

unclear. In imposing a sanction, the district court referred to the Supreme Court's decision in Roadway Express, Inc. v. Piper, 447 US 752, 100 SCt 2455 (1980), a case concerning courts' ability to sanction both under their inherent power and under 18 USCA § 1927 (West, 1985). The Supreme Court made clear in Roadway, however, as does the statute itself, that an award under 28 USCA § 1927, may be imposed only against an attorney and not against a litigant. See Id. at 2459; see also Williams v.Giant Eagle Markets, Inc., 883 F2d 1184, 1190 (3d Cir. 1989). Therefore, the district court may have committed error by attempting to impose a sanction under section 1927 against a litigant. We will therefore vacate the award and remand for clarification.

On remand, the court might sanction

MLA under its inherent power, but that remedy seems drastic in this situation, given that the conduct of MLA's attorney, rather than MLA itself, appears to have led to the delay in the proceedings. On the other hand, the district court might impose an attorneys fees award against counsel for MLA pursuant to section 1927 rather than against MLA itself. Such an award can be made under section 1927 against counsel, see Id., and if the court so intended, it should make its intent clear.

Second, MLA was deprived of the opportunity to a hearing at which it could present its case as to why its conduct was not in bad faith. Roadway plainly requires such a hearing before a finding of bad faith can be made and sanctions imposed. See Id. at 2464 ("Like other sanctions, attorney's fees

certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."). Hence, in failing to provide MLA with a hearing, the district court deprived it of due process and the attorneys fees award must be vacated.

Noting that it was deprived of a hearing, MLA raises numerous arguments on appeal which it claims justify the behavior of its counsel at trial and require vacatur of the attorneys fees award without a remand. We need not, however, address those arguments now because the district court will appropriately pass on them in the first instance. Whether an attorney has conducted herself or himself in bad faith is initially a question for the trial court in the first instance. The district court, therefore, should hold a

hearing at which both sides can present evidence and argument and then decide whether MLA or its counsel acted in bad faith and whether a sanction is appropriate.[8]

Finally, we note that the manner in which the district court calculated the amount of the award was inappropriate. The court required MLA to pay one-sixth

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[8]. During the trial, MLA did not argue for admission of the depositions on the ground that the witnesses were available" because they were more than one hundred miles from the courthouse by road travel. After trial, however, MLA argued that the three witnesses were unavailable because they resided more than one hundred miles from the courthouse by road and urged this as a grounds for denying a new trial. MLA admitted that the witnesses resided less than one hundred miles away by air distance. We think that the better rule requires that plaintiffs be within one hundred miles air distance of the courthouse rather than road distance, and hence find no merit in MLA's contention that the witnesses were unavailable for this alternate reason. See SCM Corp. v. Xerox Corp., 76 FRD 214 (D.Conn. 1977).

of the entire cost of the trial that is, the portion of the entire trial -- that the district court thought was attributable to MLA. In Roadway, however, the Supreme Court has held that section 1927 awards must be based on the amount of "excess" costs caused by the defendants' counsel's conduct. See 100 5 Ct at 2459 n3. Absent some unusual circumstance, we believe that the same rule should apply when sanctioning under a court's inherent power. Therefore, the court should calculate the amount of the attorneys fees award based on the excess time that MLA or their counsel's bad-faith conduct caused the proceedings to be delayed rather than on the total cost of the trial. Such a calculation should only be made if the court determines, after a hearing, that an attorneys fee award against MLA or its counsel is

appropriate.

III. CONCLUSION

The judgment of the district court will be vacated, and the case will be remanded to the district court for a new trial on the negligent rescue claim against the Benasa and MLA defendants. The order of the district court sanctioning MLA will be vacated, and the case will be remanded for proceedings consistent with this opinion. The order granting summary to the KDI, Sylvan defendants will be affirmed.

The parties shall bear their own costs on this appeal.

TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge

DATED: August 31, 1992

II. OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DENNIS MOONEY, :

plaintiff :

vs. :CIV. NO. 89-0068

BENASA REALTY CO., ET AL.,:

defendants:

MEMORANDUM AND ORDER

Plaintiff, Dennis Mooney, was injured in a diving accident which occurred in July of 1987 at the Wild Acres Country Club. As a result of that injury, Dennis Mooney is a complete quadriplegic. Plaintiff brought suit against several defendants based on the Court's diversity jurisdiction and the case went to a jury trial in November of 1990.

Plaintiff took the following

position at trial: 1) The pool was negligently maintained; 2) It lacked essential warnings; 3) It contained a crucial mismarking which understated the depth of the pool where Dennis Mooney dove; and, 4) The lifeguard negligently removed Dennis from the pool following the accident, thereby exacerbating the injury and rendering Dennis a complete quadriplegic. Following trial, the jury returned a verdict based on the following special interrogatories:

Question #1:

Did the Defendants prove by the fair weight and preponderance of the evidence that the act of diving into the pool involved in this case is one that involves a risk of danger to anyone who engages in that act?

yes ___
no ___

If you answered Question #1 "no", ignore Question #2 and proceed to Question #3.

If you answered Question #1 "yes", proceed to Question #2.

Question #2:

Did the Defendants show by a preponderance of the evidence that the Plaintiff, Dennis Mooney, knowingly assumed such a risk?

yes ___
no ___

If you answered Question #2 "no", proceed to Question #3. If you answered Question #2 "yes", you should not answer any further questions and return with that report to the, Court.

The jury answered "yes" to both of these interrogatories. Accordingly, having found that Plaintiff had assumed the risk, the jury returned a verdict in

favor of the Defendants.

Plaintiff has moved for a new trial, or in the alternative, for a partial new trial on the following grounds:

> (1) The Defendant, MLA, through misrepresentations, caused the erroneous admission of depositions which were inadmissible hearsay;
>
> (2) The Court erred in failing to charge the jury that Plaintiff could recover for the additional and separate harm caused by his negligent removal from the pool;
>
> (3) The Court erred in allowing Dr. Kazarian, an engineer testifying as an expert witness for the defense, to testify as to his opinion that Plaintiff's injury was irreversible upon impact with the pool bottom;
>
> (4) The Court erred in allowing Dr. Kazarian to testify concerning an expert report served on Plaintiffs after the discovery deadline;
>
> (5) Counsel for MLA created strong prejudicial error by claiming to the jury that Plaintiff had claimed that a proper warning sign was supposed to be the exact size

> of Plaintiff's trial exhibit sign, even though the Court had clearly instructed the record said otherwise;
>
> (6) The Court erred in refusing to admit evidence of safety changes at the pool after the accident; and
>
> (7) The Court erred in denying the Plaintiff the opportunity to testify in rebuttal concerning the typing abilities which Defendant's vocational expert said he possessed.

We shall consider Plaintiff's contentions seriatim.

I

Initially, we turn our attention to the Plaintiff's contention that:

> The Defendant, MLA, through misrepresentations, caused the erroneous admission of depositions which were inadmissible hearsay.

Plaintiff has also moved for sanctions and for an award of attorneys' fees, costs and expenses arising from this conduct. Plaintiff's motion is directed mainly toward Defendant MLA Management

Associates, Inc. (MLA) and its counsel, and is rooted in the contention that the November, 1990 trial was "wastefully undermined by misconduct" in the form of grave and material misrepresentations made on several occasions during the course of the proceedings by Attorney Richard Kraemer, who represented MLA. More specifically, the Plaintiff maintains that counsel at issue procured the use at trial of the depositions of three defense witnesses by falsely informing the Court and opposing counsel that these witnesses had been served subpoenas by MLA and simply failed to appear at the designated time during the trial, when in reality neither of the three had been served nor otherwise apprised that their presence was expected at the trial. In support of his position, the plaintiff has directed our

attention to the following passages of the trial transcript.

MR. KRAEMER: We have asked two of the plaintiff's friends, Matt Siracuse, these people have all been subpoenaed, Matt Siracuse, Pat Fitzpatrick, Kevin McDonald, they have all been called. They have been told to be here by subpoena, they are not here. We called all of them over the weekend and left messages, and if they don't show up this afternoon, we would ask leave to read appropriate parts of their deposition. And I can show Mr. Levin so he can counter-designate something to put it in context if he thinks we took something out of context.

MR. LEVIN: . . .No. 2, I won't take up the Court'stime with responding to the request to use depositions, so long as they have shown the classical satisfactory indications to your honor and you decide in their favor. We are not going to simply give a blanket to use of any deposition if counsel wishes to use them.

MR. KRAEMER: I am making the same representation Mr. Levin made, unless he is saying I didn't subpoena these people.

MR. LEVIN: No.

MR. KRAEMER: I didn't make you bring in the subpoenas and hand them to the Court.

MR. LEVIN: I have no doubt that you issued a subpoena. Whether the Court

decides that's sufficient, that is up to the Court. . . .

(Notes of Testimony, 11/26/90, Volume III. pp. 12- 13 (emphasis added)).

Later that day, the following exchange took place:

MR. LEVIN: ... I have been advised of the hope of the defense to utilize what now appears to be three depositions. It is my request that before they are allowed to use these depositions, that they be requested to make a foundation for their request, namely, they have said they have issued a subpoena, and I have no question as to their truthfulness as to the fact that they had their office write up a piece of paper called a subpoena. However, it is my understanding of the rules that further action has to be taken, namely, that the subpoena has to be handed to a witness, and that there has to be something called a return of service, and there has to be something showing that a check was paid.

So initially I would request that the record indicate that these things were done, and then I would request further the right to go forward beyond that and to determine what efforts, if any, were made to have the witness here.

So I would object to the use of depositions without a foundation.

THE COURT: Mr. Kraemer, do you want to respond?

MR. KRAEMER: Your Honor, yes. The

witnesses in question are Matthew Siracuse, Kevin McDonald and Pat Fitzpatrick. We had subpoenas issued and served on them, and we left telephone messages at their house, each of their houses over the weekend. They were subpoenaed to be here today, and we left telephone messages at their houses. I do not have the process server here, I didn't think that was necessary. In order to satisfy Mr. Levin's curiosity. I represent to the Court that they were served and the checks were tendered and that they were requested to be here, and they were telephoned and asked to be here.

Now, I don't know if Mr. Levin has made contact or not, but I point out to the Court that this is the same procedure we followed with the witness Seiforth [sic] that he represented to the Court that he had been subpoenaed and wasn't showing up or was away or someplace else, and I thought that was the procedure I was following in this case. And if the Court wishes, and I have to produce the process server, I can't do it today, I will have to do it tomorrow.

But I really don't believe that's necessary in order for us to read these depositions. I have given Mr. Levin the few lines that I wish to read into the record, and that's all I have to say.

MR. LEVIN: Well, just briefly in response, at this level of advocacy, there is no doubt in my mind that, and I admit it is a high level, that the reason that the deposition [of Seifert] was agreed to was because it contained

virtually as much good information in evidence for the defense as it did for the plaintiff. And as the defendant well knows, due to the requirements of evidentiary proof, it was brought forward so we could technically complete our case.

MR. KRAEMER: I might also say I have indicated to the Court this morning that if Mr. Levin wants these witnesses here, I can only apply to the Court for court action under the rules, the marshal can go out and get them, which would further delay this trial. I am entitled to have them comply with the Court Order and I am merely trying to move the case along.

MR. LEVIN: I would suggest that at the very least that a faxed copy could be provided momentarily to, if requested, from the process server showing, indeed, that under his signature he is warranting to them and to us and to the record that these people were served. I don't think that is asking too much.

THE COURT: I am going to rule that I am going to allow the defendants to move forward by use of the depositions. I am going to direct that, however, that the counsel for the Defendants follow through and place on the record the actual returns by the process server and those other items that were referred to here in your oral presentation.

I am allowing the counsel to go through with the presentation of these witnesses by their deposition testimony on those assertions.

(Id., Volume V, pp. 76-79 (emphasis added)).

One final discussion took place regarding the service of subpoenas on the defense witnesses who had not appeared; in reference to the Court's Order directing that the returns of service be placed in the record, the following exchange took place:

THE COURT: We can do this at a later time if you don't have those readily available now. I think you had them.

MR. KRAEMER: They are supposed to be brought up here, and I don't have them yet, your Honor.

THE COURT: All right.

MR. LEVIN: Just for the record, Your Honor, my concern was that I feel that I would have the right to move that the jury be instructed that they not consider the testimony of those witnesses read to them if they do not comply with what the Court decides or what the Court has indicated as the basis for their use.

THE COURT: Well, I will not grant that request at this time based upon the statements made of record. I ruled that they could be used and I will stand by

that record. If that turns out to be untrue, then we will have to address that problem.

> (Notes of Testimony, 11/28/90, Volume VII, pp. 20- 21 (emphasis added)).

It is now known to (and admitted by) all parties in this litigation that these three would-be witnesses were not issued subpoenas to appear in Court, although this was, according to MLA, a mistake about which they knew nothing at the time of trial. MLA now maintains that its counsel was incorrectly informed by the process server, indirectly through his office in Philadelphia, that the subpoenas had indeed been served; it was not until he requested the formal returns of service did he receive information, now on record with the Court, showing that service had not been effected. This information is in the form of three affidavits of attempted service, one of

which provides that process server Jeffrey Levin attempted on November 19 and 21, 1990 to serve a subpoena upon Kevin McDonald at his home, and failed both times because no one appeared to be present there. Contained in a second affidavit is the information that on November 21 of 1990, Jeffrey Levin attempted but failed to serve Patricia Fitzpatrick; the reason offered is that while the process server was able to locate her street he could not actually find her house on it. Finally, we see from the remaining affidavit that service was twice attempted upon Matthew Siracuse, on the nineteenth and twenty-first days of November, 1990, and neither time was Jeffrey Levin able to personally serve Mr. Siracuse. On November 19, the affidavit reads, a woman did answer the door at the Siracuse residence and

informed the process server that Mr. Siracuse is difficult to reach.

As stated previously, all parties now acknowledge that these witnesses were not served subpoenas prior to or during trial, but a dispute remains regarding the propriety of this lack of service and the alleged ignorance of this situation on the part of MLA throughout the trial, leading the Plaintiff to now question whether counsel for MLA deliberately and repeatedly misinformed the Court that these witnesses had been requested, by subpoena as well as by telephone, to appear and testify in the November, 1990 trial in this action. Mr. Mooney insists that this series of supposedly untruthful statements made to the Court comprises misconduct allegedly aimed at depriving the Plaintiff of the right of cross-examination, evidenced by the fact that

MLA was allowed to enter into evidence deposition testimony which was damaging to the Plaintiff's case, and did so on the basis of said falsifications. Of more than passing significance, undoubtedly, is the fact that the Plaintiff did not depose these witnesses, instead taking the "extremely small risk ... that these witnesses would expire or leave the jurisdiction".[1] Nevertheless, the Plaintiff maintains, no valid reason was ever in existence which would have lawfully allowed MLA to circumvent the rules of civil procedure which decree that except in very limited circumstances, live testimony is required during trial.

Governing this situation is F.R.Civ.P. 32 (a) (3), which lists the

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[1]. Plaintiff's Brief in Support of Motion for New Trial and Alternatively for a Partial New Trial, p.16.

limited circumstances in which a deposition may be used in lieu of a witness' oral testimony at trial. This rule allows the use of a deposition where the Court finds:

> (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

The cases interpreting this rule, while not legion, uniformly stand for the proposition that in seeking to introduce

at trial the deposition testimony of a witness rather than his or her live testimony, the party attempting to have the deposition admitted into evidence bears the burden of proving one of the five requirements listed above. Jauch v. Corley, 830 F.2d 47 (5th Cir. 1987); Hill v. Equitable Bank, 115 F.R.D. '184 (D.Del. 1987), aff'd. 851 F.2d 691 (3d. Cir. 1987). At the trial held in this civil action, the sole reason supporting the admission of deposition testimony offered by counsel for MLA was that he was unable to procure the attendance of Fitzpatrick, Siracuse and McDonald despite serving them with subpoenas, a reason now known to be lacking any factual base. MLA, in turn, currently attempts to convince us that for the following two reasons the admission of these depositions was proper, reasons

which in our view constitute more than a subtle departure from the controlling principles of law and equity.

The contention set forth by MLA regarding its inadvertently incorrect assumption that these three individuals had been personally served is one which, with a reasonable amount of diligence, could and should have been discovered and corrected during the trial. It was on the repeated assertions made to us that these three individuals were served, yet apparently dishonored their subpoenas, that this Court allowed the deposition testimony to be admitted; these pronouncements were made not once but on three separate occasions over the course of several days. It is inconceivable to us that despite the fact that counsel for MLA was on notice that the Court's permission to use the depositions was

conditioned upon the eventual presentation of proofs of service, said proofs were not only not forthcoming but nonexistent as well. At the very least, we believe that the status of these anticipated witnesses should have been confirmed prior to trial, or even during trial when their presence was expected. This Court instead received a broad promise that these three people had certainly been served and inexplicably chose not to attend the trial, and for us to allow this lack of diligent and responsible conduct on the part of counsel to go unchecked, an action which incidentally had a self-serving effect, if not purpose, would inevitably lead to untoward implications for the future.

As MLA offered as its sole excuse at trial that it had done its part in serving the witnesses who had

independently not arrived to testify, that Defendant will not now be heard to claim at this point in time that the three depositions at issue were properly admitted because the three witnesses were 100 miles from the courthouse in Scranton, Pennsylvania, where the trial took place. This argument is not only out of time, as it is one now raised for the first time and never mentioned or alluded to at trial, but it is also wholly devoid of authority. As evidenced in the Report from the National Geodetic Information Center, an exhibit that is part of the record in these post-trial proceedings, the exact distance from the courthouse to the residences of the respective witnesses is less than one hundred miles; this distance was measured by a straight line, i.e. airline distance, in accordance with the only

modern applicable rule. Hill v. Equitable Bank, supra; SCM Corp. v. Xerox Corp., 76 F.R.D. 214 (D. Conn. 1977). MLA's contention that the driving distance to the residences exceeds one hundred miles has no bearing here, as an arbitrary driving route is not the accepted manner in which mileage is calculated; equally unpersuasive is the case,[2] decided in 1871, on which this argument is based.

Accordingly, we find that the conduct exhibited by counsel for MLA during the trial in this matter, chiefly the repeated factual misrepresentations, intentional or otherwise, made to the Court regarding the service of the three deposed witnesses, must in fairness be remedied. While we agree with MLA's

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[2]. Spaulding v. Tucker, 22 F.Cas. 899 (Cir. Calif. 1871).

assessment that the admission of this deposition testimony was not outcome determinative in this matter, as the statements entered into evidence primarily concerned the question of trespass, rather than the issue of assumption of the risk, and consequently decline to order a new trial or enter a default judgment, the underlying facts place this controversy within the line of cases holding that an award attorney's fees to the Plaintiff is warranted. In federal actions, said fees are recoverable in matters where an opponent has shown bad faith, which does encompass serious factual misrepresentations. Lipsig v. National Student Marketing Litigation, 78 F.R.D. 726 (D.D.C. 1978), aff'd. 663 F.2d 178 (D.C. Cir. 1980). This principle was reiterated in Roadway Express, Inc. v. Piper, 447 U.S. 752

(1980), where the Supreme Court declared:

> The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "Bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. Id. at 766, citing Hall v. Cole, 412 U.S. 1 (1973).

The attorneys' fees owing in this matter to counsel for the Plaintiff total $122,100.00, a figure which encompasses $66,000.00 for the time of Lewis Levin, $47,000.00 for the time of William Murphy and $9,100.00 for the time of Joseph Viola. There are six named Defendants in this action, and if we were to apportion this figure equally between all six, each party would owe fees of $20,350.00 to the Plaintiff. Because our ruling today is limited to a finding that Defendant MLA is responsible, because of bad faith actions during trial, for some of the Plaintiff's attorneys' fees, we find that

MLA must pay to the Plaintiff its one-sixth share of the fees, totaling $20,350.00.[3]

II

Plaintiff next claims the Court erred in:

> **Failing to charge the jury that Plaintiff could recover from the additional and separate harm caused by his negligent removal from the pool.**

Mooney suffered his initial injury when he dove into the pool. The jury found that he had assumed the risk of this injury. However, Mooney maintains that his negligent removal from the pool

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[3]. In seeking sanctions for this conduct, the Plaintiff refers us to Rules 37 and 60 of the Federal Rules of Civil Procedure, but we find that the bad-faith concept authored in the cases cited to be the appropriate avenue to follow in condemning this conduct and attaching an appropriate penalty. We also find the method used to determine the amount of the penalty imposed, to be most fair in light of the facts of this case.

aggravated this initial injury, thereby providing a separate and distinct grounds for recovery. Mooney maintains the Court erred in failing to charge the jury that assumption of the risk could not shield the Defendants from liability for the negligent removal from the pool.

After discussing this contention with counsel on the record, we concluded that Plaintiff had presented his case on a theory of continuous liability, rather than distinguishing the degree of harm suffered in the initial accident from any harm received during the rescue. We concluded that there was insufficient evidence from which the jury could reasonably apportion the harm. Accordingly, the requested instruction was not given. This decision is consistent with Pennsylvania case law. See: Martin v. Owens-Corning, 528 A.2d

947 (1987): (Where the causes of harm do not lend themselves to separation on any reasonable basis, apportionment by the jury was the result of conjecture and improper.)

Plaintiff contends that he did present sufficient evidence on this issue to warrant the requested instruction. Plaintiff's expert, Dr. Kaplan, testified as to the difference between an incomplete and complete spinal injury. Dr. Kaplan also testified that in his opinion, with a reasonable degree of medical certainty, the failure to use a spine board in removing Dennis Mooney from the pool was a significant factor in making his a complete spinal injury. (N.T., Vol. II at 114-117) Dr. Kaplan then went on to testify as to the differences which could be expected in medical costs between a complete and

incomplete spinal injury. (N.T. Vol. II at 155- 56) Plaintiff maintains that this testimony provided the jury with enough evidence to decide on apportionment.[4] In the alternative, Plaintiff maintains that the burden of proving apportionment properly belonged on the Defendants.

The standard for apportioning damages is set forth in Comdyne I, Inc. v. Corbin, 908 F. 2d 1142 (3d Cir. 1990). The court in Comdyne held that:

> . . . damages are apportionable among concurrent causes only is there are 'distinct harms' or if 'there is a reasonable basis for determining the contribution of each cause to a single harm. Restatement

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[4]. While we acknowledge that Plaintiff presented evidence concerning the differences between complete and incomplete spinal injuries, we find no evidence quantifying the harm attributable to the initial injury as opposed to the harm sustained during the negligent removal from the pool.

(Second) of Torts § 433A (1979); see also Scafidi, 119 N.J. at 110-14, 574 A. 2d at 407-08. In such instances, **the burden shifts to the defendant** to demonstrate how the damages should be apportioned among the concurrent causes. See Fosuate v. Corona, 66 N.J. 268, 272-73, 330 A. 2d 355, 358 (1974); Prosser and Keeton, Law of Torts § 52 at 350-51 (5th ed. 1984). Where the harm, however, is indivisible, there is no apportionment of damages among the concurrent causes. See Restatement (Second) of Torts § 433A (1979). Id. at 1152 (emphasis added).

Applying this standard to the present case, we conclude the record before the court lacked any evidence which would provide a "reasonable basis" for apportioning harm between the initial dive and subsequent rescue. Accordingly, the requested instruction was properly denied.

III

We turn now to Plaintiff's allegations of error concerning the

testimony of Dr. Kazarian. Initially, Plaintiff contends the court erred in:

A. Allowing Dr. Kazarian to offer his opinion that Dennis Mooney suffered immediate and irreversible injury upon striking the bottom of the pool, thereby rendering him a complete quadriplegic.

Dr. Kazarian testified as an expert witness for the defense. Pursuant to Rule 702 of the Federal Rules of Evidence, expert testimony should be liberally admitted. (See: Advisory Committee Note - Rule 702). "[T]he Federal Rules of Evidence establish a liberal policy of permitting expert testimony which will aid the trier of fact." Roe v. Deere & Co. Inc., 855 F. 2d 151, 155 (3d Cir. 1988).

Dr. Kazarian identified Plaintiff's injuries from X-rays from which he concluded Plaintiff's head was vertically

aligned when it struck the bottom of the pool, thereby rendering Plaintiff an immediate and irreversible quadriplegic. Since the jury concluded that Mooney "assumed the risk" of danger stemming from diving into the pool, Dr. Kazarian's opinion, if accepted, would render moot any question of exacerbation of Mooney's injury due to the negligent rescue.

Plaintiff claims the testimony was erroneously admitted because Dr. Kazarian was neither a medical doctor nor an expert in the areas of swimming pools. Dr. Kazarian was not offered as a medical witness and in fact, the ccurt cautioned defense counsel "I want to be careful now that we stay away from the medical opinion because this witness wasn't offered as a medical witness." (MT Volume 6 at 39). However, the term "expert" should be liberally construed and

inexperience in areas testified to "should go to the weight, not the admissibility, of his opinion." Habecker v. Copperloy Corp., 893 F. 2d 49, 52 (3d Cir. 1990).

Dr. Kazarian received a bachelor of science degree in aeronautical and astronomical engineering, a doctor of technology degree and did his doctoral dissertation on "Dynamic Response Characteristics of the Human Vertebral Column, An Experimental Study of Human Autopsy Specimens." He has also authored or co-authored a number of papers concerning the effects of stress on the spine. He is currently an associate clinical professor at the Wright State University School of Medicine and an adjunct associate professor in the department of anatomy School of Veterinary Medicine, Purdue University.

In light of Dr. Kazarian's academic and professional background, along with the liberal policy of permitting expert testimony under the federal rules, the testimony was properly admitted.

Plaintiff next contends the court erred in:

B. Allowing Dr. Kazarian to testify to information contained in an expert report, which Defendants provided to Plaintiff 45 days after the disclosure deadline and 4 days before trial.

The standard applied to the admissibility of an expert's opinion challenged on the basis that it was supplied late is set forth in Myers v. Pennypack Woods Home Ownership Assn., 559 F. 2d 894 (3d Cir. 1977). The factors to be applied include:

> (1) the prejudice or surprise to the opposing party;
> (2) the ability of that party to cure prejudice;
> (3) the extent to which allowing the

testimony would disrupt the orderly conduct of the trial; and,
(4) whether the late submission was the result of bad faith.

Meyer's, supra. at 904.

Defendants served Dr. Kazarian's expert report on Plaintiff on August 31, 1990, in compliance with the discovery deadlines. In that report, Dr. Kazarian concluded:

> 4.2 Based upon the location of the head laceration, the form of the Cs fracture and its fracture dispersion pattern, the spinal cord injury sustained by Mr. Mooney is a form of compression flexion injury.

On November 14, 1990, Dr. Kazarian submitted a supplemental report based on an examination of X-rays of Plaintiff's injury taken at Bellevue Hospital following the accident. These X-rays were not available to Dr. Kazarian when he prepared his initial report on August

31, 1990. Based on this supplemental report, Dr. Kazarian testified at trial that Plaintiff's injury resulted from a compression fracture caused by the impact of his head with the pool bottom while vertically aligned, thereby immediately rendering him a complete quadriplegic.

Plaintiff contends that Dr. Kazarian's testimony was inconsistent with his initial expert report in which he concluded that Plaintiff had suffered a compression flexion injury. Plaintiff claims this last minute change prejudiced the presentation of Plaintiff's case.

As stated earlier, Dr. Kazarian prepared his supplemental report based on X-rays which were previously unavailable. The reasons for the unavailability of the X-rays is contested. Plaintiff claims that Defendants did not pursue obtaining the X-rays in a timely fashion.

Defendants maintain that Bellevue would only release the original X-rays to Plaintiff; that despite repeated requests, Plaintiff would not allow Defendants access to the originals; and, that when Bellevue finally acted on the Defendants' request for copies of the x-rays on November 9, 1990, Dr. Kazarian immediately prepared his supplemental report and delivered it to Plaintiff on November 15, 1990.

A comparison of the two reports reveals that while Dr. Kazarian's supplemental report is more detailed than his initial report, the disparity between the two is not so great as to warrant denying Defendants the opportunity to present Dr. Kazarian's testimony. Furthermore, although Plaintiff claims surprise and prejudice stemming from the late report, Plaintiff was aware that

Defendants were seeking copies of Plaintiff's X-rays prior to the discovery deadline. Likewise,Plaintiff waited until November 26, 1990, the sixth day of trial testimony, to object to the supplemental report and request exclusion of the associated testimony.[5] Finally, although the extent of any "bad faith" is disputed, we cannot hold either party entirely blameless for the discovery battles engendered by this litigation.

In light of the above, allowing Dr. Kazarian to testify to the opinions contained in his supplemental report did not constitute error warranting a new trial.

IV

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[5]. We note that the remedy sought, exclusion of the evidence, is viewed as "a drastic sanction." DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1202 (3d Cir. 1978); see, also: Meyers v. Pennypack Woods, supra. at 905.

Plaintiff's next claim of error:

> **Counsel for MLA created strong prejudicial error by claiming to the jury that Plaintiff had claimed that a proper warning sign was supposed to be the exact size of Plaintiff's trial exhibit sign,**

concerns counsel for MLA's closing argument. Counsel for Defendant MLA argued "no one has suggested the sign should be a different size than this. They said this is the sign, that's what I recall Mr. Schulman saying, you decide, no one said it should be a different sign, a bigger sign, this is the sign, he said this sign." (NT Volume 7, at 93)

The size of the proposed warning sign may bear on Plaintiff's assumption of the risk. However, counsel's statement was made during closing arguments, which the Court instructed the jury were not evidence. There is no indication that the statement was given

any undue weight by the jury. Accordingly, the error, if any, was harmless.

V

Plaintiff next contends that:

The Court erred in refusing to admit evidence of safety changes at the pool after the accident.

At trial, Plaintiff attempted to introduce evidence of subsequent changes made at the accident site. This evidence consisted of pictures showing changes in the depth markings at the pool and the addition of "no diving" warnings to the deck area. Counsel for Plaintiff contends evidence of these changes should have been allowed in to show proof of a dangerous condition at the time of the accident. Patrick v. South Central Bell Telephone Co., 641 F. 2d 1192 (6th Cir. 1980). Plaintiff also asserts the changes show the feasibility of making

the depth markings accurate and applying warnings. Kenny v. Southeastern Pa. Transit Authority, 581 F. 2d 351 (3d Cir. 1978)

Rule 407 of the Federal Rules of Evidence governs the admissibility of evidence of subsequent changes following an accident. Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely 'to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeached.

Plaintiff contends in the case of the erroneous depth markings, the evidence of the corrected depth should have been admitted to show that the true depth

where Dennis Mooney dove was 3 ft. -- a fact not conceded by Defendants at trial. Plaintiff also contends counsel for the Benasa Defendants opened the door to the evidence of subsequent remedial measures by reading into the record testimony from Mr. Seifert's deposition concerning the addition of a float line at the pool after the accident. (NT Volume IV at 19) Plaintiff maintains the exclusion of evidence of subsequent changes was prejudicial error in a case focusing so closely on Plaintiff's assumption of the risk.

The Defendants never controverted the feasibility of making the changes sought to be introduced by Plaintiff. Therefore, neither feasibility nor control was at issue. Warren v. Upjohn Co., Inc., 628 F. 2d 848, 855 (4th Cir. 1980). The only viable reason Plaintiff

sought to introduce the photographs was to show negligence. Accordingly, the photographs were inadmissible under Rule 407. Therefore, we need not reach the Defendants' contention that the photos would have been inadmissible under Rule 403 of the Federal Rules of Civil Procedure because their probative value was clearly outweighed by the danger of unfair prejudice.

VI

We now address Plaintiff's final contention of error:

> The Court erred in denying the Plaintiff the opportunity to testify in rebuttal concerning the typing abilities which Defendant's vocational expert said he possessed.

In light of the juries conclusion that Plaintiff had assumed the risk, any possible error in denying the Plaintiff the opportunity to rebut the testimony of Defendants' vocational

expert was harmless. However, we note that plaintiff's vocational expert also testified that Plaintiff had the ability, albeit limited, to type. Accordingly, we decline to grant Plaintiff a new trial on this ground as well.

CONCLUSION

For the reasons discussed above, we will deny Plaintiff's request for a new trial. However, in light of what we deem the abject bad faith of counsel for Defendant, MLA, in misrepresenting the fact that Matthew Siracuse, Kevin McDonald and Pat Fitzpatrick, had been subpoenaed when, in fact, the subpoenas had never even been served on these witnesses, we will grant, in part, Plaintiff's motion for attorney's fees.

We will direct Defendant MLA to pay one-sixth (1/6) of the fees incurred by Plaintiff in prosecuting this action.

An appropriate Order is attached.

Richard P. Conaboy, Chief Judge Middle
District of Pennsylvania

DATE: August 13, 1991

III. JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5738 and 91-5782

DENNIS MOONEY,

Appellant in No. 91-5738

v.

BENASA REALTY COMPANY, t/a wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.; SYLVAN POOLS, INC.; KDI CORPORATION; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC.; MLA MANAGEMENT ASSOCIATES, INC.; MOUNTAIN LEISURE ASSOCIATES, INC.; WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.; KDI SYLVAN POOLS, INC.

WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.

Third-party plaintiff

v.

FIRST EASTERN BANK, N.A.; BENASA REALTY COMPANY; BENASA HOLDINGS, INC.; BENASA INVESTMENTS, INC.

Third-party defendants

BENASA REALTY COMPANY t/a Wild Acres d/b/a Wild Acres t/a Wild Acres Country Club, Inc. d/b/a Wild Acres Country Club, Inc. t/a Wild Acres Inc. d/b/a Wild Acres Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.

Third-party plaintiffs

v.

MOUNTAIN LEISURE ASSOCIATES, INC.

Third-party defendant

MLA Management Association and Mountain Leisure Appellants. In No. 91-5782

On Appeal From the United States Court of Appeals For the Middle District of Pennsylvania
(D.C. Civ. No. 89-00068)

Present: Becker, Cowen and Roth, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

March 31, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 14, 1991, be, and the same is hereby vacated and the cause is remanded to the District Court for a new trial on the negligent rescue claim against the Benasa and MLA defendants. The order of the District Court sanctioning MLA is hereby vacated, and the cause is remanded to the District Court for proceedings consistent with the opinion of this Court. The order granting summary to the KDI, Sylvan defendants is hereby affirmed. The parties shall bear their own costs on this appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: August 31, 1992

Certified as a true copy and issued in lieu of a formal mandate on October 15, 1992.

Attest:

Clerk, U.S. Court of Appeals for the Third Circuit.

IV. ORDER SUR PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5738 and 91-5782

DENNIS MOONEY,

Appellant in No. 91-5738

v.

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.; SYLVAN POOLS, INC.; KDI CORPORATION; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC.; MLA MANAGEMENT ASSOCIATES, INC.; MOUNTAIN LEISURE ASSOCIATES, INC.; WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.; KDI SYLVAN POOLS, INC.

WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.

Third-Party Plaintiff

v.

FIRST EASTERN BANK, N.A.; BENASA REALTY COMPANY; BENASA HOLDINGS, INC.; BENASA INVESTMENTS, INC.

Third-Party Defendants

BENASA REALTY COMPANY, t/a Wild Acres d/b/a Wild Acres t/a Wild Acres Country Club, Inc. d/a/a Wild Acres Country Club, Inc. t/a Wild Acres Inc. d/b/a Wild Acres Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.

Third-Party Plaintiffs

v.

MOUNTAIN LEISURE ASSOCIATES, INC.

Third-Party Defendant

MLA Management Association and Mountain Leisure Associates, Inc.,

Appellants in No. 91-5782

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, Circuit Judges

The petition for rehearing filed by appellees in No. 91-5738 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

_____
Circuit Judge

Dated: September 29, 1992

V. TESTIMONY OF DR. KAPLAN

R I C H A R D H A R L A N K A P L A N, M.D.,

called on behalf of the plaintiff, being duly sworn, testified as follows.

THE CLERK: For the record, would you state your name and spell the last name for us, please?

THE WITNESS: Richard Harlan Kaplan, M.D., K-a-p-l-a-n.

THE CLERK: Thank you.

BY MR. LEVIN:

DIRECT EXAMINATION:

Q. Good morning.

A. Good morning.

Q. Doctor, would you tell us -- okay there?

A. Yes, I'm all right. Comfortable for me if I have something to raise one of my legs. Okay.

Q. Doctor would you tell us a little bit about yourself, what's your educational background?

A. I'm a graduate of Central High School in Philadelphia, Villanova University in Villanova, Pennsylvania. Hahnemann Medical College in Philadelphia in 1973. I

completed postgraduate training in the fields of physical medicine and rehabilitation at Jefferson Medical College and Thomas Jefferson University. This was completed in 1976. I continued on the faculty at Jefferson, first as an instructor in rehabilitation medicine. then as a clinical assistant professor of rehabilitation medicine. This was at Jefferson.

In May of 1977, I was Board certified in the field of physical medicine and rehabilitation. In 1978, I went to an affiliated institutions McGee Rehabilitation Hospital, as an attending physician. I continued at McGee until 1982 when I went into the private practice of rehabilitation medicine.

Q. Doctor, how did you happen to begin your interest in the field of medicine?

A. Well when I was seventeen, twenty-six years and two days ago I broke my neck. I sustained a spinal cord injury. Fortunately for me, it was an incomplete injury, and after a lengthy period of rehabilitation, I was able to continue with school, continue -- go onto medical school, and, in fact, I became an attending physician at McGee hospital where I had previously been a patient.

Q. Now, did this experience on your part have any effect on what sub-specialty in medicine you directed your attention to?

A. Well, certainly this experience has been the most important thing in my life.

MR. KRAEMER: Your Honor, I don't want to know why he went into medicine. I object. I think it's irrelevant.

THE COURT: Well, let's just move ahead on qualifications.

BY MR. LEVIN:

Q. Is there a sub-specialty in medicine you then concentrate on?

A. I specialize in the field of physical medicine and rehabilitation.

Q. Is there any particular type of injury that you have significantly focused on?

A. I have focused on both spinal cord injury and pain problems.

Q. Thank you.

THE COURT: What was the latter part, Doctor?

THE WITNESS: Pain problems.

THE COURT: Thank you.

BY MR. LEVIN:

Q. Now, are you Board certified in the area of rehabilitation medicine?

A. Yes, I am.

Q. And in order to be Board certified, what do you have to do?

A. Well, in the United States, one has to be a graduate of an approved medical school either in the United States or an appropriate foreign equivalent. One must have completed an appropriate internship. One must be licensed in the state or states in which they practice. One must completed an approved residency. That is, a postgraduate training program that's approved by the appropriate specialty board, see appropriate number of patients, do appropriate either surgical procedures or medical procedures solely confined to that specialty. For the field of physical medicine and rehabilitation, this is now a one year internship and a three year training program.

Upon completion of the three year training program, one is allowed to take a written examination. After a prescribed period in practice, after a successful completion of the written examination, you take an oral examination by other board members. Upon completion of the written examination, the oral examination, the period of time in practice and the residency, one then may be passed upon as being Board certified as a specialist in that field.

Q. And, is one of the areas of concern

in rehabilitation injuries to the spine?

A. Yes, it is.

Q. And did you take these examinations?

A. Yes, I did.

Q. And did you, indeed- pass these examinations?

A. Yes, I did.

Q. And are you certified as a specialist in the area of rehabilitation medicine?

A. Yes, I am.

Q. Now, as part of your works do you teach -future doctors?

A. Yes, I do.

Q. And where is that done?

A. At Jefferson Medical College. Thomas Jefferson University now.

Q. And have you been called upon by both people representing plaintiffs and people representing defendants to come to court and explain the significance of injuries to juries in other cases?

A. Yes, sir.

Q. And have you been accepted as an expert both in federal courts and in state courts?

A. Yes.

Q. Both in this state and in other states?

A. Yes, sir.

Q. What percentage of your time is spent in assisting people to recover from injuries, and what percentage is spent in giving your consultation in legal cases?

A. Most of my time is dealing with, as a treating physician. I go to Court very rarely. As a specialist in rehabilitation medicine, many of the people were injured in accidents of one sort or another, it's a nature of the practice. Many people have lawyers attached to them. I would say that perhaps one or two percent of my time or less is spent going to Court or doing depositions. The other 90 percent is as a treating physician.

Q. And, just as some attorneys are, are you being paid for your time that you're taking away from your practice in coming here to help us with this case?

A. I sure hope so, yes.

Q. And is the fact that you're being reimbursed for your time in any way going to affect your opinions here today?

A. No, sir.

MR. LEVIN: Thanks. Would you care

to cross?

MR. HANNA: I have no questions.

THE COURT: Mr. Kraemer?

MR. KRAEMER: Yes, Your Honor.

BY MR. KRAEMER:

CROSS EXAMINATION:

Q. Dr. Kaplan, I just have a few questions. Your undergraduate degree was earned in Villanova university?

A. Yes, sir.

Q. And what field was that?

A. Humanities.

Q. You don't have an engineering degree?

A. No, I do not.

Q. And you don't have a degree in radiology, you're not licensed as a radiologist?

A. No, sir.

Q. You're not licensed had as a neurologist?

A. No, sir.

Q. You're not licensed as an orthopedic surgeon?

A. No, sir.

Q. Do you have any biomechanical engineering degree?

A. No, sir.

Q. And you're not a physicist?

A. Not sir.

Q. You're not a mechanical engineer?

A. No, sir.

Q. Now, in this case, you were not the treating physician, is that correct?

A. That is correct.

Q. You saw the plaintiff at --

MR. LEVIN: I'm sorry, does this go to qualifications?

MR. KRAEMER: Yes.

MR. LEVIN: Objection.

MR. KRAEMER: Well, I shouldn't address him, your Honor. I think he asked about treating versus testifying, and I just want to be clear.

THE COURT: You can continue.

BY MR. KRAEMER:

Q. Dr. Kaplan, in this case, you were asked to examine Mr. Mooney at the request of his attorney?

A. That is correct.

Q. So that you could assist a jury in assessing the needs that he would have, is that right?

A. I'm not sure --

Q. As someone suffering from a spinal cord injury, you're somebody who can tell us what kind of things he will need in the future and what's happened to him in the past, is that right?

A. Yes, sir.

Q. Okay. How many times did you see him?

A. Once.

Q. And do you have with you the X-ray films taken at Belview when he was transported there originally?

A. No, I do not.

MR. LEVIN: I'm sorry, we do have them.

THE WITNESS: Okay.

MR. KRAEMER: I asked if he has them.

MR. LEVIN: Does he have them with him? No.

THE WITNESS: NO.

MR. LEVIN: No, we brought them up

for him.

MR. KRAMER: That's all I have, your Honor.

THE COURT: All right you can examine the Doctor.

MR. LEVIN: Your Honor, you had expressed a statement that you wanted to break at twelve, if I'm wrong. I have don't know if this might be --

THE COURT: Would that be a better time for you to break now?

MR. LEVIN: If it's all right, your Honor.

THE COURT: Well, let's take an early recess. There are some criminal matters that we have to handle over the lunch hours members of the jury, and I've been asked to recess a bit early. So supposing we agree, so we'll come back at 1:30 instead of 2:00. We'll recess until 1:30 members of the jury.

THE CLERK: Court is recessed.

MR. KRAEMER: Your Honor, I didn't hear that time.

THE COURT 1:30.

MR. KRAEMER: 1:30.

(11:55 a.m., Court recessed.)

(1:40 p.m., Court resumed without

the presence of the jury.)

MR. ROTHENBERG: Your Honor, can we approach for a second?

(Off-the-record side bar conference held.)

(Jury bought into the courtroom.)

THE COURT: Good afternoon members of the jury. We're ready to proceed now.

MR. LEVIN: Thank you, your Honor. Good afternoon, Doctor. Your Honor, at that time I'd like to offer Dr. Kaplan as an expert whose testimony should be considered by the jury as an expert in the area of spinal cord injury.

MR. KRAEMER: Your Honor, I thought that he was an expert in rehabilitative medicine. I thought that's what he testified to.

MR. LEVIN: I'm sorry. In rehabilitative medicine with specific interest in the area of spinal cord injury.

THE COURT: All right, you can proceed.

MR. LEVIN: Thank you.

BY MR. LEVIN:

DIRECT EXAMINATION:

Q. Dr. Kaplan, could you assist us in

getting a little bit better understanding of the cervical spine. First of all, what is meant by the cervical spine? And, Doctor, I wonder if you might use the anatomical chart, which I represent to the Court and counsel is a standard medical chart from a company that supplies medical schools.

A. Well, the spine Itself' is divided into regions. It begins at the base of the skull and travels downward to the sacrum and the coccyx or tail bone. We divide it into several regions. The top most region is the cervical region or the neck region.

There are seven cervical vertebrae or stacked pieces of bone that fit and interlock.

There are twelve thoracic vertebrae, that's the middle of the back.

Q. Could you just point to them as we speak?

A. Okay. Excuse me, the cervical vertebrae (indicating).

Q. Let me give you this as a pointer.

A. You got a pointer, thank you.

MR. HANNA: Mr. Lavin. I come prepared, sir.

MR. LEVIN: I bow to you.

BY MR. LEVIN:

Q. Here, your equipped status. This will allow you to get back a little bit so the jury can see.

A. Okay. The regions of the cervical vertebrae, the thoracic vertebrae, the lumbar vertebrae and the fused sacral vertebrae (indicating).

The thoracic vertebrae are distinguished because they all have ribs attached, and the ribs come around, the front and stabilize the spine. Both the cervical group and the lumbar group are not stabilize, and that's where you have the most motion in terms of flexion, extension and rotation in the cervical area and in the lumbar area (indicating) In this particular instance when we talk about the cervical area, we talk about these first seven bones. They are rings with rudders and attachments for muscles and supporting structures. In the center of this structure is a canal, which encases the spinal cord (indicating).

Q. Now, I notice on the picture on the right, there is some white attachments to the cervical spine. Could you explain to the jury what that represents or what they are?

A. Wells this is, one of the major ligaments of supporting structures, nuchal ligament.

Q. What does a ligament do?

A. The ligaments attach bones to bones,

and they also serve as attachments for some muscles. A muscle may attach to a ligament.

Q. And what role do those ligaments play in the alignment of the bones of the cervical spine?

A. Wells they hold the whole thing together. The bones themselves are stacked one on top of another, and they're held together by bones and ligaments.

Q. Okay. Do muscles also play a part in that process?

A. Yes.

Q. Now, I'd like to' show you another anatomical models and I wonder, could you come over here?

A. Can I get my little model? I can take it apart.

Q. Okay. If you want to.

A. I want to bring it to show this.

Q. Stand over here.

A. Okay, it's broken off. This is the cervical level. I don't have the bottom most cervical vertebrae it broke off the stand, but we can see the bottom.

Q. Now, just for orientation, where would the skull be in the model that's in your hand?

A. The skull would be sitting on top.

Q. Okay, and would you tell us --

A. And here is base of the skull.

Q. Would you tell us, please, the numbering convention?

A. They're numbered from top to bottom. The atlas and axis are the first and second cervical vertebrae and then they're numbered threes four, five, six and seven. The spinal cord begins at the base of the skull (indicating).

Q. Is that what you're pointing to now?

A. This orange material, as it's shown. It is the main circuit branch of wires that attach all the nerves of your brain to all of the nerves of the rest of the body, except for certain cranial nerves. A cranial nerve exits the skull separately.

spinal cord gets into the spinal column, nerves exit two by two, and they're named according to the location. In the cervical area, these nerves are named above the level of the nerve. That means that since this bone would be the second cervical vertebrae, this nerve that's coming out above it is the second cervical nerve, the third cervical nerve, the fourth or C-4, C-5, C-6, C-7 and so forth down the spine.

Q. Now, in this particular case, which

vertebra were involved in terms of damage?

A. I would have to review the records right now.

Q. If you'll hold off on that one second, please. I'd like to show you, also, sirs the -- now, this is shown, except for the ligament you mentioned, without any other muscles, or that's kind of a ridiculous question. The jury can see for themselves.

A. That's showing the bones alone.

Q. Now, if you look, please, at a drawing that's entitled, "The Nervous and Circulatory System," and I wonder if you can explain to the jury, using the drawing on the left, the significance of the role of the spinal canal in the body's functions?

A. Well, the spinal canal is the protective bony case in which the spinal cord travels. It protects the spinal cord. It also, the way the structure is connected, it allows movement, flexion, extension, rotation. We can do a lot of things.

Q. Now, is there anything in layman's terminology, that you could use as an analogy co the spinal cord itself?

A. You could think of it as electrical wires or telephone lines encased

within a flexible conduit that protects it. What you see here is not the spinal cord itself. You see the nerves, as 1 point out, exiting. In the neck level we have a group of nerves exiting called the brachial plexus, the arm plexus. These come out and form a railroad track of attachments, crisscross, and then uncross and then travel down the arm to the hand. These serve the functions of sensation, position sense, touch, pain and motion. These nerves are two way streets. The spinal cord in this area is thick. The spinal canal is thin. The same thing happens again in the lumbar area. The spinal cord thickens to allow the spinal nerves to take form, the major bodies of the spinal nerves, and then at approximately the lower thoracic levels the spinal cord ends, and a group of individual nerves then exits two by two through a structure called a cauda equina. These go to the legs. In addition from above. all the functions of the arms and legs are involved, bowel and bladder, sexual function and some digestive functions as well.

Q. Now, you used the term the nerves exit the spine, is that an anatomical term?

A. Yes.

Q. Do messages also enter up toward the brain --

A. Yes, yes, the, nerves come and go

These little openings are called foramen' or windows, and the spinal nerves exit or go out, and obviously these are two way streets, so the message also comes in via these routes.

Q. Now, in the neck, does that contain the wires for the entire body below that surface?

A. Yes.

Q. Okay. Now, I wonder if you might take your notes and help us, please, understand what happened in this particular case.

Leave that there, and I wonder if you might, bring them back so we can sit in front of the jury and hopefully explain it to them.

A. The notes report injury to two bony vertebrae. Now, it should be distinguished that there is an orthopedic injury and a neurological injury, and these are separate. The orthopedic or bony injury involves the bones, C-1, 2, 3, 4, 5.

Q. Now, before you go into that. Doctor, what part, if any, do you -- to what extent, if any, do you deal with in your analysis and treatment of spinal cord patients, do you deal with the injury to the bone itself? What role does hat play in your work?

A. I'm not an orthopedic surgeon.

Q. I understand, that's been established. But do you, as part of your daily routine, put X-rays on an X-ray box and look at them and analyze them?

A. All the time.

Q. Okay, and is' this an area that you do on an ongoing basis?

A. Yes, I do.

Q. And is it necessary for you to be able to interpret the nature and the extent of the bony injury in order to plan your treatment?

A. Yes, it is.

Q. Okay, go ahead.

A. The bony injury is described as occurring in the fifth and sixth vertebrae. Instead of being nicely stacked one on top of another and in normal alignment, there is report of a comminuted or fragmented fracture of this bones the C-5 bones and the bone has been displaced backwards- this bone is backwards on top of the sixth one above -- below it so that there is a disruption of the normal alignment.

Q. Now, in terms of the range of possible bony injuries that you encounter in your work from the most mild to the most severe, are you able, and, again, Doctors any opinion you might give me I want it to be with what is called reasonable

medical certainty, are you familiar with that term, sir?

A. Yes, sir.

Q. Okay. So I don't have to keep repeating it, if at any time I ask you a question you cannot tell me with reasonable medical certainty, you will so indicate, is that agreed, sir?

A. Yes.

Q. Do you have any opinion about, can you tell us what the range, within the range of injuries from the least severe to the most severe, where this particular bony injury came to pass? You can sit down there now if that's convenient for you.

A. This would be in the middle, moderate injury. The least severe, there would be no X-ray evidence of any disruption. The most severe, there is complete disruption of all of the ligaments, the bone, the facet joints may be locked, may be totally distortion. There may be a step off of sonometers or more.

Q. You'll have to explain what that means, a step off?

A. You can look, and it looks like there's a step when you look at the side view. The bones just obviously are totally disrupted. A lay person would be able to look at it and say, there's where the problem is. This would be somewhere in the middle.

Q. I see. Now, what happens, I want you to assume that Dennis went into a pool and struck his head. Did you have an opportunity to see Dennis and examine him yourself?

A. Yes, I did. And did you have an opportunity to evaluate his situation at the present time?

A. Yes, I did.

Q. Or at the time you examined him? Assume that he, indeed, received an injury when his head contacted the bottom of the pool. I want you to assume that that happened. What happens, what happened to his neck, what is the mechanism of the injury, both to the bone and to the surrounding structures supporting the bone, what happens?

A. Well, the injury is that there is both compression, that's a vertical loading force down, and flexion to cause the bones to be comminuted in one area more than the others to fragment one side more than the others and the spinal columns excuse me, the spine cord, the major nerve wires inside have been in some way compromised.

Q. What do we mean by "compromised"?

A. They've been squashed, irritated, pinched, hammered, hit, some or all of the above.

Q. Now, we've had a discussion here about spine boards, and you were in

the courtroom when that occurred. Why, from your orientation, are spine boards necessary at all?

A. To immobilize the spine.

Q. Why is it necessary to immobilize the spine? "What happened to the surrounding structures? Where does that come into play?

A. Wells we know that greater injury occurs a result of more motion. When we teach care, we do not assume, we know what is going on, and we absolutely demand complete immobilization to the point or taping someone's head to a board so there is no motion.

We know that the better the care is, the more immobilization, the more immediate, the more prompt, the more professional emergency care is, the lower the incidence of severe injury.

Q. Now, the ligaments that you mentioned, can you just point on this model where they're going to be attached, more or less?

A. Well, they are all. There's a ligament in the front called the anterior longitudinal ligament, there is a posterior longitudinal ligament that travels on the back of the, the big vertebral body inside, and there are various other ligaments throughout supporting and holding the entire structure together.

Q. What happens to these ligaments during a flexion and compression injury?

A. They are stretched and perhaps torn.

Q. And what happens to their job of supporting the cervical neck?

A. They lose the ability to hold this bony structure together and allows for greater motion and greater pressure on the spinal cord.

Q. Now, is the spine, spinal cord designed by nature to handle an existence without that kind or support?

A. No, it is not.

Q. Has the medical profession come up with some device on a temporary basis at the site of an injury to substitute for the support that these ligaments gave before the injury?

A. Well, we use anything that's available.

Q. Well, is there anything that might be available at a pool, for instance?

A. A spine board sand bags, masking tape.

Q. Okay. You name it.

A. Everything.

Q. Doctor, what is meant by a complete spinal injury? Am I using that terminology correctly?

A. Yes.

Q. Please correct me if I'm not.

A. A complete injury is one in which there is no motor, that's muscle movement, or sensory function, that's the input back, existing after 24 hours.

Q. Now, is there a term called, quote, "incompletespinal injury"?

A. Yes.

Q. And what does that entail?

A. That means that there is some preserved or still existing function, motor or sensory existing below the level of the known injury 24 hours out.

A. Could this include ability to use to some extent the legs?

A. Yes.

Q. And to some extent the arms?

A. Yes.

Q. And to a reasonable extent the bladder and the bowel?

A. Yes, yes.

Q. And can you give us an example of an

incompletspinal injury?

A. Wells that was the injury that I sustained. At the time of the initial injury, I had no motor function. I had some sensation that was very vague. Over a period of, beginning about two weeks after my injury, I was able to wiggle a toe. Perhaps two months later. I could move my feet, and approximately five months after the injury I was able to walk out of the hospital. I still do not have enough hand function to wipe my behind, however. Over a period of years I gradually recovered more function.

Q. At the present time, were those findings or those observations made on this very personal level, do you now have an opinion based upon what you've seen over the years whether they were consistent with a classical or typical picture of a spinal injury, a partial spinal injury or an incomplete spinal injury?

A. Yes.

Q. What is the anticipated future of an incomplete spinal injury using, you know, the general rule and as it relates to your personal observation?

A. Well, it's very difficult to predict that. The function can be anything from partial to complete recovery, and each case then becomes a very individual matter.

Q. But are you able to place the person in a generalized category of complete spinal injury versus incomplete spinal injury?

A. Yes.

Q. Okay. Did you at my request examine Dennis Mooney in your office?

A. Yes, I did.

Q. And did you go over his entire physical situation both neurologically from history and from your personal examination?

A. Yes, I did.

Q. Now, how, and we'll get into the details about this in a moment, but in regarding the two important categories which you've advised us the medical profession uses, how would you define the category of his injury, is it complete or incomplete?

A. He is a complete injury, complete lesion.

Q. Okay. Now, Doctor, I want you to assume that no spine board was used in removing this young man from the pool. Are you able to express an opinion regarding whether or not the failure to use a spine board was a significant factor in making him a complete spinal injury?

A. Yes, I am.

Q. What is that opinion?

A. I believe that it was a significant factor inmaking him a complete injury.

Q. When you say, "I believe," is that speculative or is that with reasonable medical certainty?

A. That is with reasonable medical certainty.

Q. And by the words, "I believe," you mean that's your opinion?

A. Yes.

Q. Okay. Now, when you examined him, would you take out your report and use that as a guide, and tell us what it was, your report of January 25th, you saw and what you reviewed and what kind of history you obtained from him?

A. Well, in conjunction with my examination of Mr. Mooney, I reviewed the records of the Pocono Medical Center, the Belview Hospital Center, the Rusk Institute of Rehabilitation Medicine of the New York Medical Center, and also a report of Nassau Plastic Surgical Associates.At the time of my evaluation, Mr. Mooney was 23 years old.He had been gravely injured in the afternoon of July 12, 1987 as a result of a diving accident, There was no reported loss of consciousness. However, he sustained a fracture dislocation of

C-5 and 6, these are the two vertebrae I've noted, with immediate spinal cord injury with quadriplegia. This is paralysis, both motor and sensory, of all four limbs. He was taken to the Pocono Medical Center that evening where his neck was immobilized, and he was transferred promptly to the spinal cord injury program at Belview Hospital in New York City.Two weeks later, after initial medical stabilization and treatment of pneumonia, he was transferred to the Rusk Institute of Rehabilitation. NYU. This is a rehabilitation hospital for long-term care of spinal injuries, among other disabilities. He remained at Rusk until April 15, 1988.

Q. What kind of place is Rusk?

A. Rusk is a rehabilitation hospital.

Q. Is that similar to McGee?

A. Yes, it is. It's a little larger, I believe. Following discharge from the hospital, he was in the care of his parents. He was living in New York City in first floor apartment downstairs from his parents. He had been treated for urinary tract infections, ischial decubitus ulcerations and a heel decubitus ulcer.

Q. For a layman's term, what does that mean?

A. These are bedsores, pressure sores.

A spinally injured person who does not have sensation cannot feel or can't move even in response to that pressure, normal pressure that you would feel when you cross your legs, when you're sitting too long and you squirm, if you're putting pressure on your elbow, you cannot respond to an inch. Our body can't withstand the pressures or our own body, and if you're sitting and do not move, the bone will compress the muscle and fat tissue below it, cut off the circulation and the tissue will actually die.

Q. How is this avoided in a normal person? Why doesn't this appear in everybody?

A. We move around and we reel, and we feel uncomfortable and we just squirm around all the time. A spinally injured person does not have the ability to move and can't feel when they've been sitting too long. Skin breakdown then occurs. The skin literally rots from the inside out, and he developed pressure sores over bony prominences in his heel and in the ischial region. That is the bone, your sitting bone. If you're sitting in a normal way, you can feel the bone right under your fingers. The skin breaks down, and you get a hole literally through to bone.

Q. Okay. Now, did you analyze his, the nature and severity of the spinal cord injury that he had?

A. Yes. At the time I saw him and still, he has a complete permanent spinal cord injury at the C-6 level. by that I'm defining now the nerve level injury. C-6 is the nerve level. The C-6 nerve exits the spine between C-5 and C-6. It is involved in some wrist extension, and that is the farthest most representation downward. So he may have some biceps, which is C-5 and 6. He may have a flicker of wrist extension but no hand activity, no -- nothing certainly below the armpits or downward.

Q. Now, did you take the opportunity to evaluate, for yourself, what he could move and couldn't move?

A. Yes, I did.

Q. And did this, to your satisfaction, was this a confirmation of the analysis made at the Rusk Institute regarding his C-6 level?

A. Yes, I found that he was, indeed, a C-6 motor complete quadriplegic man. There was no C-7 function. His sensation was present in the upper lumbar area in the back. There was sensation into the upper chest region in the front. He reported some hot and cold sensation in the arms, however there was decreased or absent leg touch at stroking or pin prick below C-7 in the extremities.

Q. Now, you had mentioned the fact that not only from your personal experience but from your study of

the people that you have treated, that at some point in time the incomplete spinal injury has a recovery phase, is that correct?

A. Yes.

Q. What is the possibility, in your professional opinion, of any recovery phase now three and-a-half years later the accident for Mr. Mooney?

A. There is none.

Q. Now, did you determine his life-style in consideration of his injury?

A. Yes, I did.

Q. And what was that?

A. Well, at the present time, Mr. Mooney relies on his parents or friends for his care. He remains considerably disabled. Currently he is a prisoner of his apartment. As stated above, he resides in a first floor apartment in the same building with his parents. He cannot get in or out without the assistance of someone. He cannot answer the door himself if he is in bed or out of his wheelchair.

There have been some modifications to his apartment, however still much was to be done. Specifically, the door in had been widened, but there was a step to get in that he could not negotiate himself.

Q. Now, to get in and out of the apartment --

A. Okay, he requires the assistance of two people to get in and out of the apartment. He had a hospital bed and a wheelchair that is adapted to his van. If you notice his wheelchair, it's a little heavier than most. There are metal supports underneath that attach to a, the floor plate of a van and has that advantage to allow that but also makes it heavier to maneuver. The bathroom door had been widened. The sink was taken out of the bathroom, and the bathing facilities really were not adequate. He needed to be transferred in and out of the bathtub and cannot do this himself. He is able to feed himself when he is set up with appropriate food. He does not do any or his own food preparation. He cannot cut food. He does not -- he cannot obtain food. He does none of his own laundry, none of his own cleaning. He cannot clean himself after a bowel movement. He cannot manage his urinary appliance. He has an external condom catheter. His bladder does not drain normally. He does not have the normal sensation to empty his bladder, and his bladder drains in a reflex manner. When it fills, it spontaneously voids. He has a condom that is hooked to a tube to a leg bag.

Q. Now, if room permits and money permits, is it possible to modify a bathroom so he could wheel himself

at least into the shower area?

A. Yes, sir.

Q. Now, is it necessary still, though, for someone to remove him from the wheelchair and onto some kind of a support to actually be bathed, to take a shower?

A. He would need assistance in any event at his level of injury.

Q. He can't take a shower, I don't know, can you take a shower in a wheelchair? It's kind of hard on --

A. It you transfer to a shower chair, it's a chair that, you know, can handle water on a repeated basis, you can then wheel into a shower area. It's a large area sort of like in gym class, and take a shower much as you do go through a car wash.

Q. I see.

A. You pull a lever and the water goes. You back up and -- or you let go and you can soap up with appropriate long handled instruments, and you can do much of it on your own given a large enough space and appropriate modifications.

Q. Given his injury, would he be able to get himself into that special chair?

A. He would need assistance for that transfer.

Q. Now, did you review with him his normal routine, is that part of your normal evaluation?

A. Yes.

Q. And what did you learn about this?

A. Well, his normal routine is to waken in the morning at approximately seven. His mother would assist him in dressing, in bathing and grooming. Every other day he has a Bowel routine. His bowels don't work normally. He does not have normal sensation and requires assistance to move your bowels.

Q. Well, doctor, I'm a little confused, perhaps the jury is confused, what is it, what nerve going up to the brain controls the bowel?

A. Well, let me go back. Everything below the neck has been affected, all of the major organ systems. The spinal cord injury is not just the ability to walk or use your hands. It's not just the ability to feel. The bowel function, bladder function, sexual functions are very much voluntary activities. The nerves to the bowel and bladder exit the spine at the sacral level, and while these nerves have not themselves been damaged, the main wire above at the neck level has been destroyed, and there is a loss of voluntary thinking control of bowel and bladder functions. This was, the urinary problems, urinary kidney failure, kidney infections

was at one time the major cause of death in spinal cord injury.

Q. Has that been rectified with modern medicine?

A. Yes, it has.

Q. Now, you mentioned that he has a bowel routine and his mother assists him. I'm sorry, did you mention that? I don't remember.

A. Yes, I reported that his mother assists him. His mother puts on a condom catheter for him and hooks it to a urinary drainage bag. She dresses him and assists him into his van wherein the process is complete. He attends college several days a week. He gets to school via his adapted van.
He told me he does not have any difficulty driving. However, he did have occasional difficulties parking. The van has a lift and the lift has a very large doors and unthinking people, number one, park in places that are designed for handicapped people only, and they think they can use those spaces, and cars will park too close to those spaces. A person who may be able to get into that parking place, but then they can't put down the van door, the gate, because the other cars are squeezed in too tight. So even though you're in that space, you can't get out of your vehicle. and he reported occasional difficulties because of people parking in an inconsiderate manner.

Q. Is there any way that he has to answer the door?

A. No.

Q. And how, as far as his history to you was concerned, does he get assistance to do something like that? Well, it he was in bed, he couldn't answer the door. He told me that there was an intercom to summon help up on the third floor where his parents live.

Q. I see. Now, is he on any medication?

A. Yes.

Q. What medications is that?

A. Currently his medications include Valium and Lioresal.

Q. What is that?

A. These are two drugs that are designed or the goal is to reduce spasticity.

Q. I'm sorry, what do you mean by spasticity, Doctor?

A. Spasticity is involuntary muscle activity.

Specifically, you move, you're too tight. When a doctor taps your tendons as part of a normal examination, a normal person, there will be a small movement or a muscle. When a spinally injured

person's reflexes are tapped, there will be a great movement or that muscle.

Q. Wells what happens in a spasm?

A. Wells the brain has been cut off from the muscles so the reflex arc has been increased. Muscles are very stiff, very tight, and there can be involuntary jerking, positioning, scissoring, some people get thrown out of bed. It makes it hard to dress, bathe or move about and use what function you do have.

Q. Is a charley horse a layman's term for a muscle spasm, or is that --

A. No, that's a different kind. A charley horse is a cramp and that is a peripheral, that is, exists -- the problem is very local and exists only in your leg. The kind of spasticity we're talking about deals with an injury to the brain or the central nervous system such as the spinal cord. It causes involuntary muscle tone, involuntary motion and increased involuntary movements.

Q. Well, were you able to determine if these medications totally prevented it?

A. No, they reduced it but not totally prevented it.

Q. From your experience, over what period of time does a complete spinal injury victim have to continue taking these kinds of

medication?

A. Well, these can be present in both incomplete and complete, and this is for your lifetime.

Q. So at least as to these two drugs then, he might have to take them whether he is complete or incomplete?

A. That's right.

Q. Okay, fair enough. You mentioned Vitamin C in your report, and what were the other two?

A. Well, he also takes Vitamin C and Mandelamine.

Q. Explain what Mandelamine is.

A. Mandelamine is a urinary antiseptic to help keep him from getting further urinary tract infections.

Q. And what else did he tell you --

A. He also takes Colace, which is a stool softener to help his bowel program move along.

Q. Now, what did he tell you about the presence or absence of the spasticity which you explained to us?

A. Well, he has spasticity in all four extremities.

Q. How would we tell that the -- could we lock at him when this happened as

laymen and know it's happening, or is this something that --

A. Well, if you knew what you were looking for you might.

Q. Wells rather than laymen, what do you see when one of your patients, one of your quadriplegic patients have spasticity?

A. Well, they may have involuntary movements or jerking, something called clonus. You may see the flapping of the root on a foot plate. You might see flexural withdrawal response much as you would see in a baby if you touch them where they withdraw. There would be increased reflex tone when you tap their tendons. If you tried to pull their arm over head to range it, you would have withdrawal and increased muscle tone.

Q. Is any of this movement on their part voluntary in any way?

A. No, it is not.

Q. Now, did he mention as to when these increased spastic occurrences occurred?

A. Yes, I asked him about some of the typical times when spasticity will increase. Specifically with Mr. Mooney, it is, spasticity will increase with decreased activity. If he sits around for a long time and doesn't do anything, such as just sitting in class or watching

television, or to get out or his van is he hasn't been too active. It will occur when his bowel is full or his bladder his full. It will occur if there is any other new injury. If he bangs his elbow or sprains a finger or strikes a knee, if you get an infection in your foot or--is you have a bowel bladder infection, your spasticity will increase.

Q. Now, skipping down, other than his parents, does he -- well, at the time you took this interview, other than his parents, did he have any other attending care at that time?

A. To my acknowledge, he did not.

Q. All right. I'll make the representation to you that at present time, he has someone help him. Now, did you determine the type of wheelchair that he has?

A. He has a manual wheelchair, that's one you push yourself, and it has lugs. These are projections from the rim that allow you to push with your palms rather than grip the wheel.

Q. And as we are looking at Mr. Mooney, would these be the black projections that are coming --

A. Yes.

Q. -- out, they' re like fingers from the outside wheel?

A. Yes.

Q. Why is that necessary in his particular injury?

A. Well, he does not have the hand strength to grip the wheel. He does have some shoulder depressor function, and he can fix his elbows a bit and with a lug in his hands he can propel the chair forward with shoulder muscle.

Q. What is autonomic dyslexia? Could you tell us what autonomic means?

A. Well, that's the --

Q. I will tell you what, instead of breaking it down, just explain it in your best way to us.

A. Well, we've all had the feeling of being a bit nervous when our bowel and bladder gets full. We might sweat a little bit. In a spinally injured person, this reflex is totally out of control. A full bladder will raise blood pressure, cause you to sweat above the level of injury, cause you to perhaps get a pounding headache. When we actually measure blood pressures, they can go up to 280 over 150.

Q. This is an actual measurement you've made in your office --

A. These are actual measurements.

Q. -- or in a hospital?

A. It is a potentially dangerous situation. Usually the situation is

relieved immediately when the bowel or bladder is emptied. It can occur with ejaculation. It can occur with a wound. It can occur with even a full belly. It is an exaggeration of normal reflexes that exist within the body. The problem is that the normal inhibition, the brain's normal stopping of these wild fluctuations and body function is lost.

Q. Now, did he give you a history regarding surgery that he had?

A. Yes.

Q. Specifically, I'm talking about the girdle stone procedure that he has mentioned here before.

A. He's had surgery on the left lip, and this was a, called a girdle stone procedure.

Q. What is that about? I'm sorry. Can you look at the skeleton?

A. Well, it's easier if I use the diagram. Here, this will work. This is the femur.

Q. Here, Doctor.

A. Okay. This is the leg bone. Specifically, you take off the head of the femur, all right, remove the bone.

Q. I'm sorry, when you say take it off, you mean cut it off?

A. Cut it off, remove it, throw it away because now there won't be any pressure anymore. The bony articulation between the thigh and the leg is just destroyed.

Q. Well, is this a common occurrence with complete spinal injuries such as this?

A. No, it is not. It's a more severe complication.

Q. I see.

A. It will also be done. it's an old procedure. It was done in people with severe hip pain before we had the procedure of total hip replacement. It's also still done after a total hip replacement in arthritic patients when the total hip surgery has failed.

Q. Well, what's a medical basis of deciding to cut off the end of the leg rather than trying to get it to go back in?

A. Well, it's not cutting off the whole leg. It's taking off the bone inside.

Q. I'm sorry, cutting off the end of the bone.

A. Well, pressure comes from the bone. and that bone inside, when a person is sitting or laying down, is pressing from the inside out and it's squeezing tissue. It takes away the inside thing that's causing

pressure.

Q. I see.

A. It's also done with the understanding that there isn't any more leg function that you lose.

Q. And right now holding his leg onto his body is what?

A. Muscle.

Q. Okay. Thank you. Now, on a more positive side, what can he within his environment, as far as his history to you is concerned, what is he able to manipulate or use given his extent of his hand function that he's demonstrated to us already?

A. Well, he's able to drive his van, which is a very important thing. Once he's set up in his chair, he can get in and get out of his van and drive and travel distances and carry on some very independent and important activities.
Within his own environment, he's able to manipulate cassettes, both video and audio if he's in his wheelchair.
It's important he can chose his own entertainment, assist in school work and things like that. However, once he is in bed, he really can't manipulate any cassettes or anything.

Q. What did he tell you about his history and relationship to his immediate family in going to family

affairs and things of that nature?

A. Well, since he's, since his injury, even though he lives in the same building, he hasn't really been in his home. He's not been back to the original family residence. He has not attended family meals, celebrations or anything else within the family home, which is upstairs in the third floor.

Q. All right. Now, that, I assume, is not because they're unwilling to have him, but is there an elevator in that house as far as you know?

A. Not to my knowledge.

Q. So it's just a matter of --

A. It's physically impossible.

Q. Physically impossible to get up there.

A. He has had no counseling since discharge from the hospital as to sexual function. He's had no psychological counseling. He's had limited contact with members of the opposite sex since his injury.

Q. Now, Mr. Mooney has reported to us that he has no feeling in terms of his sexual function. Is this consistent with his complete spinal injury?

A. Yes, it is.

Q. Okay. Now, what was the basis of

his fear, as he explained it to you, for going out socially occasionally?

A. Well, he's had bowel accidents, and these happen and continue to happen. In the absence of both the ability to voluntarily control your bowels and the absence of any feeling, he's had episodes where he's had bowel accidents. He's moved his bowels while out in public, and you don't know about it until it's too late. It's very embarrassing.

Q. From your experience in dealing with complete spinal cord injuries, what effect does this have on a young person of Mr. Mooney's age and experience?

A. Well, it's both very devastating, and on the positive side, as a rehabilitation Doctor, it makes you stronger because if you can deal with that and continue to live and continue to go on, you can be a strong person.

Q. Now, you mentioned that he has a neurogenic bladder, bowel and a neurogenic bladder. You explained about the bowel. What's a neurogenic bladder?

A. Well, we use these terms to say that the improper function of bowel and bladder is based on nerve damage. His bladder is innervated by the same muscles -- excuse me, the same nerves that innervate the bowel. You return to almost a baby bladder function, where an infant's bladder

will fill and then empty. The problem is we cannot be sure that Mr. Mooney's bladder empties fully because of the spasticity of the sphincter which may stay shut. So that even though the muscle of the bladder itself is squeezing closed or squeezing all the urine out, the sphincter muscle may not be working in sync with it and still may be locking it closed. The problem is when urine is left in the bladder and you're laying in your supine, this residual urine, this leftover urine can eventually become stagnant, get infected and produce kidney damage, kidney infections, stones and other problems.

Q. Now, Dennis has described to us what he termed was bowel routine. Is that a term that used amongst complete spinal injuries?

A. Yes.

Q. Is that something that in any way he can handle for himself?

A. Not, it is not.

Q. Now, in talking to him, did you discuss with him his activities, whatever they might be, outside of the house?

A. Yes.

Q. What does he do when he leaves the house, what does he engage in?

A. Well, he attends college part time.

Q. Okay. And did he express any hopes and aspirations to you?

A. He told me of some form of business management, specifically retailing or computers in the future, although at the time when I saw him, his specific plans were fairly vague. He really couldn't say, I want to be a this or a that with any specific goal.

Q. Now, will you share with us your final analysis of his overall situation?

A. Well, the overall situation is that he has suffered what is in my personal and medical opinion one of the most calamitous things that can happen to a human being. He has a complete motor and sensory injury. He has a brain trapped within a body that doesn't work. It's not just the inability to move. It's more of the inability to have sex, to have feelings, to be considered even a normal person. Even though nothing happens to spinally injured people in terms their brains people literally look down on them. You know, we're standing, and everybody else is sitting down. If someone is in a wheelchair and someone is standing, people normally make eye contact and talk to the standing person. He has been deprived of his individual liberty, his individual freedom, as well as his ability to use his body. Every major organ system has been affected. It's permanent and it's terrible.

Q. Now, does he, given the medical state of art that we have today, does he have a normal life expectancy in your opinion?

A. Given good medical care, he does have a normal life expectancy.

Q. Over that period of time. would you review with me briefly some of the areas that maybe, that we haven't discussed already, that may be particularly, of particular concern to a complete spinal injury individual such as Dennis. For instance, what happens when he has a cold?

A. When he has a cold, because the muscles below the level of his injury have been affected, he doesn't cough normally. He doesn't move air in and out of his lungs well.

His spasticity may increase. He is more prone to have a small infection become a major one. Since he has already seeded or gotten his bladder involved, the prostate gland then becomes sort of a hiding place for bacteria, he can have recurrent urinary infections just on the basis of having an upper respiratory infection.

Q. Now, what happens to these individuals in their. **and I know you're not a psychologist or a psychiatrist, but just in terms your rehabilitation experience, first of all, does rehabilitation function have with it a psychological or

mental health aspect?

A. A very big part of our field, yes, sir.

Q. And what kinds of problems do folks such as Dennis have who have a complete spinal-injury?

A. Well, it is very difficult to adjust to such an overwhelming loss. It begins at the point of injury, the realization of injury, and the first thing we notice is that people deny the whole thing. There's a period of grieving for one's own body, and a gradual readjustment, reintegration to accepting, if such a word is possible, that you're going to live a life different than you ever thought it would be. There is disruption in your personal well being, in your view of yourself in terms of the whole world, in terms of your ability to plan a future, in terms of your relationships with your family. He's an adult now and his mother is wiping his rear. It's not a normal way to go through life.

Q. Doctor, did you at my request -- strike that. In the course or your work as a rehabilitation physician and with the emphasis on the spinal injuries as you have, have you in the past evaluated the present and future needs of victims of these kind of complete injuries?

A. Yes, I do.

Q. And before I get into that, did I

hand you package which has been identified as, with the Court's indulgence, as p-74 , which I tell you is a list of past medical bills that Dennis has incurred up to, right on up to September of this year?

A. Yes.

Q. And did you at my request review them to see what types of services they cover?

A. Yes.

Q. Now, did you observe that they range from a $70 emergency room fee, through a $3,000 helicopter fee, up to $150,000 rehab fee at Rusk Institute?

A. Yes.

Q. And do you see at the bottom of the second page that the total is $213,224 and some cents?

A. Yes.

Q. Doctor, do you have an opinion as to whether or not these bills are reasonable in today's medical community for the extensive services that Dennis received?

A. They would appear to be reasonable and necessary.

Q. And do you feel, do you have an opinion regarding the cause of the necessity of these bills?

A. Yes, I do.

Q. What is that?

A. The spinal cord injury he has sustained.

Q. Okay, thank you.
Now, Doctor, did you also at my request put together your evaluation of Dennis' needs for the future, that is from the time you saw him going on through the rest of his lifetime experiences?

A. Yes, sir.

Q. And did you, would you explain to the jury the types or care he needs with specific reference to Page 4 of your report?

A. Sure. We break these down in terms of different categories. We've already discussed his emergency care, the initial hospitalization --

Q. Now, that's not the emergency care from the accident now. This is future care.

A. Yeah, I'm saying, we were -- yes.

Q. Okay.

A. From the present on he would require rehabilitation follow-up care, general medical follow-up care, rehospitalization for complications, outpatient physical therapy, occupational therapy and vocational therapy. He would require ongoing

psychotherapy. He will require attendant home care. He requires home modifications. He requires durable medical equipment, including home and car medication. By durable equipment, these are things that you have and last. He also requires disposable medical equipment.

These are thing's that you use, and in our society throw away, such as bed pads and catheters and wipes and dipes and things he requires medication. He requires vocational retraining. And then my, last category, is cost sustained by a spinally injured person that's not necessarily borne by an able bodied-person. I'd like to comment on that.

Q. What do you mean by that?

A. Everything costs more when you're disabled.

Q. Why is that?

A. Well when you're an able-bodied person, you go in a supermarket and you do your own shopping. When you're a disabled person, you're more likely to call up on the phone and get groceries delivered. Well, this costs more. When you're a disabled person, you don't do your own lawn. Somebody else does it for you. When you're a spinally disabled, person, you don't go to the cheapest dry cleaner or even the one that does the best job. You go to the one that's most convenient or

has a drive through.
When you're a spinally disabled person, you no longer travel at the best bargain. When you take a vacation somebody else has to come with you. You might take a more expensive vacation just because the one you wanted to do or the cheaper or the best deal really couldn't accommodate you. It's hard to put a specific dollar figure on this, but we do know from thousands of people's experience that it just costs more to be disabled to go through normal everyday life.

Q. So you didn't put a specific cost on that?

A. That's impossible to do.

Q. Did you, at my request, go through this list and, based upon your experience and study, and not only -- strike that. Is your opinion based solely upon your personal experience, or are there also publications and reference materials you as a person interested in helping complete and partially spinal cord people can refer to?

A. It's based on publications and reference materials.

Q. And did the materials that you read correspond or agree with your own personal experience in this area?

A. No, they do not.

Q. Well, how are they different? Were

they more conservative?

A. Well, Mr. Mooney's injury is a complete injury.

Q. I'm sorry. By personal, I didn't mean you as an individual. I mean you as a treating physician.

A. They do correspond with my experience with other similarly injured patients.

Q. That's what I meant, thank you. Now, you mentioned in your report that you feel he's already past the emergency room need and the initial hospitalization as well as the initial rehab?

A. Yes.

Q. So on the first three items, that would be included already in the items in the cost that we've reviewed?

A. Except for the more recent charges that would be included in some ongoing care.

Q. Okay. Now, let's begin with the fourth one, namely his need to visit a spinal cord center. By the way, what is a spinal cord center?

A. Well, a spinal cord center --

Q. That's different from the central spinal cord that you were discussing here, I assume?

A. That is correct. Nationwide, through the National Institutes of Health and other governing bodies, there have been a group of regionally designated spinal injury centers. NYU participates in one. I participate in another, the Regional Spinal Injury Center at Delaware Valley. This is a nationally funded and sponsored program of both research, training and treatment.

Q. Now, many laymen have heard of burn centers. Is this sort of the same thing for spinal injury?

A. Yes. it uses the same model approach.

Q. And this a collection of a number of specialists?

A. Yes.

Q. Medical specialists?

A. Yes.

Q. What kind of medical specialties do these particular centers, one of which you tell us you're a part, what kind of medical specialties do they utilize?

A. Specialists in neurosurgery, orthopedic surgery, rehabilitation medicine, internal medicine, psychology, social work, nursing. emergency care, and research within these areas and teachers who train other physicians and health

providers to participate. There are specialists in data collection, data analysis to determine what patterns and what treatments should be recommended for the future.

Q. Across the country, how many of these spinal injury centers --

A. I'm not sure I know that number.

Q. Okay, fair enough. Now, you mentioned that you feel he should be seen at one of these spinal cord centers on an annual basis. Why is that, sir?

A. Well, we recommend, at McGee, we promise lifetime care, and we recommend an annual checkup to go over all of the potential needs that are pertinent to a spinally injured person. We find that the needs can be, are so specialized that while a spinally injured person should have follow-up in the community with a general family physician who's available, we also would like to have a specialist take a view at the same time.

Q. Is this some kind of like really intensive review where a number of specialists review?

A. Yes, it is.

Q. And. how long would this kind of intensive study last according to your --

A. They vary for four to seven days,

depending on what's found.

Q. And what is the approximate cost of this type of review?

A. Currently it runs four to five thousand dollars.

Q. Doctor, I want you to be, in the range of your figures, conservative.

A. Yes.

Q. In this case, I assure you there's no need for any exaggeration. So $4,000, is that a one time cost, or would you expect that with good medical care to occur every year?

A. We recommend this every year.

Q. Now, is this just for a while or for the rest of his normal life?

A. For the rest of his life.

Q. Now, how about your number five item in terms of his ongoing medical needs?

A. Wells we feel that he has ongoing needs in his community with various physicians, such as an internist, a urologist and a rehabilitation physician. These are usually carried out on a monthly basis, and I would expect to cost approximately, $1,000.

Q. Thank you.

A. And this would be every year for the rest of his life.

Q. How about your six item?

A. Well, the potential for rehospitalizations for major complications exists. It is statistically quite significant at Mr. Mooney's level. We have rehospitalization data for year one, year two, year three, year four, and this is through the model spinal cord injury system program.

Q. Now, by rehospitalization, you mean for other problems --

A. To be associated --

Q. -- that have flowed from the spine cord injury?

A. Yes, the complications of bowel, bladder, skin, psychological, bed sores, so forth.

Q. Has this actually already occurred in Dennis' case?

A. He's already had surgery and hospitalization several times for urinary infections, the hip surgery and so forth.

Q. Now, on an annual basis, what would be a conservative estimate for this --

A. Well, certainly the exact cause are tied to the nature of what happened. His hospitalization for the girdle stone procedure review was a $15,000 bill. I'm estimating a projection of four to five thousand dollars

annually, figuring good years and bad years, but would project approximately four, five thousand dollars annually every year.

Q. And is this in keeping with what's in publications and your reference material?

A. Yes, it is.

Q. Now, how about a physical and occupational therapy program?

A. Well, he is in need of continued physical and occupational therapy.

Q. Why is that important?

A. Well, we normally prescribe exercise for healthy adults. Certainly a disabled adult should have just as much exercise, if not more, and requires professional supervision to maintain to his maximum. He is in need of both restorative that means a potential of reaching a high level function, and maintenance care.

Q. And what is the --

A. Well, I've suggested --

Q. -- annual recommendation?

A. -- he be seen on a weekly basis for physical therapy and for occupational therapy. This is one session. Current charges are $80 to $100 for physical therapy, and the same is true for occupational therapy, or $8,000 annually.

Q. And, on your eighth item, what does that deal with?

A. The eighth item is psychotherapy. He is definitely in need of ongoing psychological care and support and counseling.

Q. Now, is that just particular to Dennis, or is this something overall for complete spinal injured patients?

A. Overall and particularly in his instance.

Q. I see. What is your basis for that determination?

A. Well, the lack of care, the knowledge of the magnitude of his loss, the magnitude of the family dislocation. I also suggested family therapy for a long period of time so that the family can deal with what this has done. There are other siblings who are now suddenly involved, and mom and dad are taking care and putting more attention, and, you know, it didn't used to go that way.

Q. How about when the other children are, when the youngest children are in their late teens, is it still important then, less important?

A. Certainly one would hope that there are goals within psychotherapy, that the goals are achieved and sooner or later people manage on their own. I cannot tell you when that would

happen.

Q. Just on his need alone, what would be your conservative estimate for his future needs in the area of psychotherapy?

A. Well, for his needs, it's would be an indefinite period for years and years.

Q. And how much would that be per year?

A. It is approximately $100 per hour in New York City, and this would be approximately $5,000 per year.

Q. All right. Now, you've mentioned what he can do and what he can't do at home, and I represent to you that his mother has taken care of a lot of things. Now, at the present time, I want you to assume that he does have an attendant beginning to come in to help him out. What is the standard, again, looking at the New York community or the eastern seaboard as your economic base, given the cost of living there and the cost of obtaining skillful help, what is the type of charge that is the typical charge from your experience and from reference materials you were able to --

A. The typical charge for an attendant is approximately eight, nine, ten dollars per hour. It can be high in an area like New York. You' re providing personal attendant care. While it does not require specific medical treatment, you have got to

pay somebody to wipe your behind for you. At ten dollars an hour, or eight dollars an hour for ten hours, or ten dollars an hour for eight hours, it still comes out to eighty dollars a day, three hundred and sixty-five days a year, the rest of your life, or approximately thirty thousand dollars per year.

Q. Now, if you're fortunate enough to get some family members to do it on a couple days, that would be a little less at least for some period of time?

A. Yes.

Q. Now, assuming he doesn't have to move, are there costs that can be hopefully one-time costs or at least maybe once every ten years, some kind of permanent change in some structure?

A. Yes.

Q. And what type of change would that be?

A. Wells he's currently, as I've reported, a prisoner of an inhospitable environment. He can't get in and out on his own. He should be able to get in and out of his own residence he should even have two, I recommend for safety, if there's a fire or an emergency.

Q. Two exits?

A. Two entrance or exits, yes. He

should have a door that he can manage totally on his own. He should have a kitchen that he can do some things himself. He should have his own toileting and bathing facilities that he can manage. Since he doesn't have his own homer it's really difficult to project what kind of modifications he can make. and I actually haven't seen his apartment, so I couldn't tell you what can and can't be done.

Q. Well, again you're referring to the averages you have seen and to publications on the matter. Assuming he could get a private home, what would be the cost that he would face?

A. The typical costs that our patients run up against are thirty to forty thousand dollars of modifications to make their environment hospitable to them.

Q. I see. Now, finally, let's talk about things that are not daily or monthly requirements but are changed somewhat more repetitiously than once every ten or twenty years, such as wheelchairs and bands, things of that nature. Have you paid attention to those needs?

A. Yes.

Q. And what were your findings in those areas?

A. Well. he has durable medical equipment needs, and these things

wear, you know, they last longer than pillows and pads, but they do wear out. He will require -- he currently has a standard wheelchair.

Q. What do you recommend for him?

A. Well, we recommend replacement every three years. His chair is about three thousand dollars.

Q. Now --

A. And it needs a replace every three years. It's about a thousand dollars a year if you want to spread it out on an annual basis.

Q. Now, do you feel given his complete spinal injury that he would be a candidate for a powered wheelchair?

A. Absolutely.

Q. Does he have one now, do you know?

A. No, he does not.

Q. What would that cost?

A. It costs approximately $5,000.

Q. And how long do they typically last from your experience?

A. They gave three to five years, given -- it depends on how hard they're used and what kind of environment they are put in.

Q. Now, he's fortunate enough to have a van. What is the typical

replacement cost from your experience of a van, given the fact that -- well, first of all --

A. Wells his van cost $15,000.

Q. Now this has a special height?

A. A special -- it's been channeled actually to allow him to drive it, and a special modification to allow him to steer it and control it. It cost $20,000 to modify the van.

Q. So it's 15 for the basic van and 20 for the modifications?

A. Yes.

Q. A total of --

Q. A total of $35,000.

Q. Now, you mentioned a couple other things. I wonder if you could just give us an idea of the other items that are durable, not as long as a van perhaps, but not necessarily everyday to be replaced, what are they?

A. Well, I should point out the next time he gets a van, I'd like him to get a four-wheel drive vehicle just because in the winter time they're more reliable than a two-wheel drive.

Q. Okay.

A. We also recommended at one time before cellular telephones, we told

our patients they should have CB radios to be able to summon help. Now it's simpler to have cellular phones.

Q. You used to say a flat tire would not be something --

Q. He'd have trouble. Suppose the door would lock, jam, and you' re just stuck inside. the mechanism didn't open you can't get out of the van. You may be parked in your own driveway, but you're still a prisoner inside and you have to summon help.

Q. Okay.

A. He requires things such as a replacement of a shower chair, as I've said. If you have a waterproof hard plastic type thing you can get in and out of the shower with that's a wheelchair that goes in the shower. An electric hospital bed, side rails, et cetera. Overall these durable medical equipment needs can be expected to run approximately three or four thousand dollars a year replacement on an annual basis.

Q. So that is an annualized cost?

A. Overall. I mean, we add the hospital bed, the shower chair.

Q. Now, the next item is medication. Now, Doctor, I want to ask two figures for you. Is it correct that you estimated that his future annual

cost for medications would be $2,000 a year?

A. No, you skipped one.

Q. I'm sorry.

A. The disposable medical equipment.

Q. Oh, okay, I'm sorry.

A. If he uses -- he should be doing intermittent catheterization, that's a check on residual urine. He has not had good urological follow-up. These are sterile catheters to place in the bladder to make sure it's emptied.

Q. And you say he's not doing that now?

A. He's not been doing it.

Q. I see.

A. He needs the textus or the condom catheters, tubing, legs, bags, collecting devices, velcro straps, disinfectant, urinals, waterproof -- those blue pads you see in the bed, incontinence liners for his bed, rubber gloves, pillows, padding, positioning foams support stockings, et cetera. These can cost two to three thousand dollars a year. He requires wheelchair cushions, and these need to be replaced on an annual basis. They are surprisingly expensive. They can run $300 to $600 apiece.

Q. These are specially made for

disabled individuals?

A. They can be anything from simple foam to molded seats.

Q. How about tools for eating and drinking. does he require --

A. Yes, he requires -- the setup he's got various holders and universal grips that he uses. When you buy them from a medical catalogue, they're remarkably expensive.

Q. How much do they run?

A. I've listed $300 per year.

Q. Now, returning to the medication, Doctor, I'd like you to give me two figures, if you will. You have mentioned that two of those medications would, indeed, be required in your opinion by incomplete spinal cord victim. and I would like you to deduct from your $2,000 estimate, give us two figures please, of the amount that an incomplete spinal cord victim would suffers as well as a complete.

A. I don't know if could I separate that, what -- the medication usage, it could be the same.

Q. Okay, Well, can you separate out, in other words, what I'm saying to you is, I don't want you to count in your estimate those two medications which you advise us that Dennis might have needed if he was a partial spinal victim. So would

you, in just a generalized way, reduce that figure?

A. I'll put it in half. Its current costs are approximately $2,000. It could be a thousand dollars.

Q. All right. So even if he, in other words, even if the spine board was used and he was an incomplete victims he would still have some medication expense?

A. That's correct.

Q. So we can't ask for that as part of our estimated future that we're going to ask somebody to pay?

A. That's correct.

Q. Vis-a-vis the spine board, anyhow?

A. Yes.

Q. Okay.

A. He's also in need of vocational training. Currently he is involved in a self-directed vocational training program. He's going to college. But he might need specialized counseling to help him find a job so that he can achieve his maximum vocational potential. This is very important, given that he currently really qualifies for less than 10 percent of the available jobs in the U.S. job market.

Q. I see. But you didn't put -- you

felt you were not capable of putting a price on that so you didn't put one on?

A. It's really hard to say what job he might want and how much help he will need.

Q. Fair enough. Doctor, if this was an incomplete injury, can you tell me whether any of these could be eliminated from your list. You mentioned the reduction of drug costs. How about this on going rehabilitation for bowel and bladder problems?

A. He would have better bowel and bladder function.

Q. Okay. And would he need --

A. He might have no further costs other than an annual urological checkup with a doctor and perhaps a kidney X-ray.

Q. And needless to say if he had the ability to walk, even though it might not be a perfect ability to walk he would need the wheelchair and special van?

A. That's correct.

Q. And do each of these observations apply to that, list that you've gone over with us?

A. That is correct. But would he need ongoing psychological care.

Q. He would he need that?

A. Yes.

Q. Okay. Thank you, Doctor.

THE COURT: Mr. Hanna, you can cross examine when you're ready.

BY MR. HANNA:

CROSS EXAMINATION:

Q. I hope you remember to let me have my pointer back at the end of your testimony. That's okay, I'll get it.

A. Okay.

Q. Now, Doctor, I noticed in your report of January 25, 1990 that you reviewed, in fact, I think you used the language, "a significant portion of Mr. Mooney's past, medical records."

A. Yes.

Q. Now, I have a couple of those records here that I'd like you to look at because you presumably review, I'll come over to you, and perhaps you could read certain portions of these records to the jury. I have here what I believe is the emergency room record of --

MR. LEVIN: May I ask that I at least know the reference --

MR. HANNA: I beg your pardon?

MR. LEVIN: Custom has it --

MR. HANNA: The emergency room record from the Pocono Hospital.

MR. LEVIN: Thank you.

BY MR. HANNA:

Q. If you have a copy of it handy, you can refer to your own copy, and then I will not look over your shoulder.

A. This is the report of Doctor Baerd.

Q. This is the report of Doctor Baerd.
A. Yes.

Q. Okay.

A. Yes.

Q. I'd like you to read that page aloud.

A. It's dated 7/12/87. It is Robert Baerd, M.D."This patient was examined in the emergency room of Pocono Hospital at approximately 7:40 P.M. on July 12, 1987, with a history of having sustained a neck injury while diving into a swimming pool. He was briefly dazed but remembers immediately sensing numbness in his body, and inability to move his extremities. He related having injured his neck earlier in the week but experiencing only pain for a while. He apparently received no specific treatment for that. "He was brought to the emergency room awake and alert but with

obvious clinical quadriplegia. There was flexor movement of his upper extremities. There were complaints of pain in the neck. X-rays were obtained which revealed a communicated compression fracture of the anteriors" that's the front part, "of C-5 vertebrae minimal displacement of C-5 body posteriorly," that's moving back on C-6 "by one to two millimeters only. There was no evidence of significant subluxation. "Neurological examination revealed a sensory level to pin between C-5 and C-6 complete on both sides with priapism," that's an involuntary penile erection. "Complete loss of motion below the biceps, although minimal extensor movement was present in the left wrist." That's, as I said he's able to bring his wrist, there is some C-6 function in the wrist. "No hand grip noted. His respiratory efforts were good. He aid not manifest clinical shock Blood pressure, "I can't read my copy, what that was.

Q. How about 96 over 70?

A. That's, that would make sense. "Respirations 18, pulse 84. There were some abrasions on his anterior chest, abrasions on his head. No other apparent injuries. His neck was immobilized in a collar and sand bags on a back board. "Clinical impression, spinal cord injury with quadriplegia due to C-5 compression fracture without significant subluxation. "Arrangements are being made for prompt transfer to

the spinal cord program at Belview Hospital in New York's spinal cord center.

Q. Okay. Mr. Levin. And if -- I'm handing you the discharge summary from the Belview Hospital Center, and if you just would read the history of the present illness, that first paragraph would be fine.

MR. LEVIN: Is it's agreed he's going to read nothing else on that sheet?

Mr. Hanna: That's exactly right, your Honor.

THE WITNESS: "History of present illness." This was dated 7/27/97. "The patient is a 20 year old while male who hit the bottom of a swimming pool at 5:00 P.M. after dive and became immediately quadriplegic. The patient was taken from the pool to Pocono Hospital and transferred to Belview for possible inclusion into the spinal cord protocol."

BY MR. HANNA:

Q. Thank you. Just a couple of other questions. You're not a neurosurgeon, I believe?

A. No, I'm not.

Q. And you're not a neurologist?

A. No, I'm not.

Q. Now, from time to time would you refer patients to either a neurosurgeon or a neurologist?

A. Frequently, yes.

Q. Do you know a doctor by the name of Fred Luvlin?

A. Yes, I do.

Q. He is a neurologist at Jeff?

A. Yes, he is.

Q. Have you had occasions to refer patients to him?

A. No, sir.

MR. HANNA: I have no further questions.

THE COURT: Mr. Kraemer?

BY MR. KRAMER:

CROSS EXAMINATION:

Q. Dr. Kaplan, I don't mean to pry, but you do wear glasses, could you tell us what your eye problem is?

A. I'm nearsighted. I'm beginning to become, require bifocals, I guess.

Q. What is your uncorrected vision?

MR. LEVIN: Your Honor, is this anywhere near the scope of direct, anywhere in the neighborhood or the town?

THE COURT: Are you asking me that?

MR. KRAEMER: We're in Scranton.

MR. LEVIN: I'm sorry, legally speaking, forgive the analogy. I object to this.

THE COURT: I'll sustain the objection unless there's some --

MR. LEVIN: Foundation.

THE COURT: -- reason for it or some purpose that I could see.

MR. KRAEMER: At this point I wanted to ask some questions about sight problems. He's a physician, and I wanted to understand his problem, that would be part of his experience.

THE COURT: What relevance does that have to this case?

MR. KRAEMER: It has to do with what the plaintiff could see when his glasses were removed as he ran over and dove into the pool.

THE COURT: No, I'll sustain the objection.

BY MR. KRAEMER:

Q. Were you ever aware of what Mr. Mooney's uncorrected vision is?

MR. LEVIN: Same objection, your Honor.

THE COURT: I'll sustain the objection.

BY MR. KRAEMER:

Q. Sir, Dr. Luvlin is a professor of neurology at Jefferson Hospital, the hospital where you did your internship and residency?

A. That's correct.

THE COURT: How did you spell his name?

MR. KRAEMER: L-U-V-L-I-N. your Honor.
THE COURT: Thank you.

BY MR. KRAEMER:

Q. Did you ever, have you ever taken a course that Dr. Luvlin gave or a lecture or anything like that?

A. No, he's a year -- he graduated medical school a year ahead or me. He continued with the full-time staff and has published papers in unrelated things. No, there has been no lecture of pertinence to me that he has given.

Q. but he teaches at the college, at the medical college where you --

A. That's correct.

Q. You also teach there- but you don't teach in the neurology department, is that right?

A. That's correct.

Q. Were you ever, Do you ever consult with neurologists?

A. Yes, I do.

Q. I want to show you a copy of a report.

MR. LEVIN: Objection, your Honor. This report has not formed any basis for opinions of this witness. A videotape was taken of this witness, Dr. Luvlin and

MR. KRAEMER: Your Honor, this is a speech. He's objecting.

MR. LEVIN: Wells unless your Honor orders me otherwise, I'd like to place on the record the basis for my objection.

THE COURT: Wells I don't even know what's happening here as yet. Sometimes we anticipate that the rest of us know what you're talking about and I really don't. Apparently, Mr. Kraemer, you intend to ask the witness some questions about --

MR. KRAEMER: About a report, yes your Honor.

THE COURT: A report or another doctor in this case?

MR. KRAEMER: Yes, sir.

MR. LEVIN: A report of an expert

they contacted to evaluate the case as to liability.

THE COURT: I'll overrule that objection. I'll take objections to any continuing Questions as they move on, but I think this is proper cross examination.

BY MR. KRAEMER:

Q. Doctor, in your consultation with a neurologist, is that the type of report that a neurologist would prepare and send to you?

A. No, it is not.

Q. Because it's in letter form to a lawyer?

A. No, sir. I obtained consultations from neurologists for the purposes of diagnosis, treatment, recommendations. There is no report of diagnosis, treatment or any recommendations within this.

Q. Is this the type of report that you would rely on in the medical field for the subject matter contained therein?

A. Perhaps.

Q. So if you were to ask a neurologist to give you these kinds of opinions, this would be the kind of report you'd expect to received isn't it?

A. I would have him see the patient.

Q. You would have to see the patient?

A. No, I would never ask a neurologist to render me an opinion without referring that patient for examination.

Q. Okay, but if you referred a patient for evaluation and ask for an opinion from the neurologist on these kinds of areas, this is the type of report that you would receive, isn't it?

A. Yes.

Q. And this would De the type of report that doctors customary rely upon if that's what they want the opinion on isn't that right?

A. That's correct.

Q. Okay. Were you ever provided with this report?

A. Yes, sir.

Q. Okay. Now, when were you provided with the report of Dr. Luvlin?

THE COURT: What did you say, When was he?

MR. KRAEMER: Yes.

THE WITNESS: I don't specifically recall. Certainly sometime after it was produced, and I don't -- after it was, he did it.

BY MR. KRAEMER:

Q. Sometime after he did it?

A. Yes.

Q. Okay. Sometime after August 28th, 1990?

A. That's correct.

Q. And before today?

A. - That's correct.

MR. LEVIN: Your Honor. I would object to the reading of the report until it has been established that this witness has relied in any way or the wording of that report. otherwise he's getting a person to testify from his report out of context without bringing the man to Court.

THE COURT: No, I don't see anything objectionable at this point.

MR. LEVIN: Thank you, your Honor.

BY MR. KRAEMER:

Q. Dr. Luvlin is a board certified neurologist and professor of neurology, is that correct?

A. That's correct.

Q. And his expertise is different than your expertise. Your expertise is in rehabilitative medicines is that correct?

A. Yes, and Dr. Luvlin. I do not

believe, participates in the spinal cord injury center at all.

Q. But he's a neurologist?

A. He's a neurologist.

Q. A different area than in which you're trained?

A. That's correct.

Q. Dr. Luvlin states, the cervical spinal injury is the direct result of the diving accident. Did you see that in his report?

A. May I see it?
Q. (Reported handed to Doctor.)

A. Yes.

Q. The admission history at Belview hospital states that, in its history, that Mr. Mooney hit the bottom of a swimming pool after a dive and became immediately quadriplegic. Did you see that in the Belview admission note?

A. That's what it says, yes.

Q. And that was also in their discharge summary, that he hit the bottom of the pool and become immediately quadriplegic?

A. Yes.

Q. And, in the first report that you wrote in this case, do you have a copy of your first report up there?

I think you were testifying from your report, weren't you?

A. Yes.

Q. Do you have a copy of your report?

A. Yes.

THE COURT: Here it is.

MR. KRAEMER: If I could come up.

By MR. KRAEMER:

Q. You wrote --

MR. LEVIN: Tell us what page you're locking at.

By MR. KRAEMER:

Q. I'm looking at your report or January 25, 1990 on the first page. You reported in January of 1990 when you first wrote to Mr. Levin about you opinions in this case, that he was gravely injured in the afternoon of July 12, 1987 as a result of a diving accident. There was no loss or consciousness reported, however he sustained a fractured dislocation of C-5 and 6 with immediate spinal cord injury and quadriplegia, is that correct?

A. That's correct.

Q. So at that time you reported what was in the Belview admission and discharge, immediate quadriplegia from the diving accident hitting his

head on the bottom?

A. That's correct.

Q. And the same thing that Dr. Luvlin concluded, correct?

A. No.

Q. I'm sorry, what was that last answer?

A. No, it is -- I'm -- there's a difference between what's being reported and what's being concluded.

Q. Okay. Now, you have no training, I think you've told us, you have no training in orthopedic biomechanics?

A. No, that is not true. I, told you I, was not certified. I did not say I had no training in it. The field of physical medicine and rehabilitation includes the physical, psychological, social-vocational aspects of disease. We're trained in the biomechanical, the physiological, the medical aspects of all of this stuff.

Q. Okay. But there is a specialty In the field in this country of orthopedic biomechanics, isn't there?

A. It's not a recognized medical specialty.

Q. I didn't say it was a medical specialty. I said there is such a specialty.

A. There is such a specialty.

Q. And those are people who confine themselves to that field, isn't that right?

A. I believe so.

Q. Okay. And you have not -- you are not so specialized?

A. No, sir.

Q. Okay. Now, you said that you do not have the X-ray films yourself, but Mr. Levin said he had them with him here, is that right?

A. Yes sir.

Q. And you've seen these?

A. Yes, sir-.

Q. And I think you told us. Although you' re not a radiologist, you look at films, is that right?

A. That's correct.

Q. Did you also know that a CT, scan was taken?

A. Yes.

Q. And could you tell the ladies and gentlemen of the jury what a CT scan is as opposed to an X-ray?

A. Well, a CT is an X-ray. It's a very sophisticated film of X-ray. The computer assisted X-ray produces detailed reconstructions of the bone and sometimes the soft tissue structures and produces literally very clear slices of the bone and cord and disk material.

Q. Where was the CT films is it called a scan or a film or what is it?

A. However you want. It's a computer axial tomographic scan, study, X-

ray.

Q. Where was that performed for Mr. Mooney?

A. It was in the Belview plan. I would assume it was done there.

Q. Okay. And you obtained the actual films or just the report?

A. Just the report.

Q. How about the plain X-rays, did you get the actual films or just the report?

A. I've seen the film.

Q. Where did you see the films,

A. In my office.

Q. And, did Mr. Mooney bring them to you, or how did you get those?

A. I've seen them, they were provided by Mr. Levin at a later date.

Q. Excuse me?

A. They were provided by Mr. Levin this summer.

Q. This summer he got you the films?

A. I believe so, yes.

Q. And that was so that, in connection with your testimony in this case?

A. Yes, sir.

Q. It was not in connection with your treatment of the patient?

A. No.

Q. Now, will you agree with me, sir -- that the primary level of injury for Mr. Mooney is at C-5, C-6?

A. Well, that's the bony injury. The nerve injury would be described as C-6 complete.

Q. Okay. Will you agree, sir -- what is the vertebral centrum?

A. The vertebral centrum?

Q. Yes.

A. I, would assume they' re talking about the vertebral body?

Q. Do you know what a vertebral centrum is?

A. I'm not sure what's being referred to.

Q. Is that a term which is used by orthopedic biomechanical experts?

A. I'm not familiar with the tern.

Q. Then you could not agree or disagree with the statement that the C-5 vertebral centrum is severely comminuted.

A. Wells now they' re talking about the vertebral body as reported in the X-ray report, the anterior portion of

the vertebral body. They're saying centrum they're using a different term for vertebral body. That's this big --

Q. That's what you're --

A. -- chunk of a thing.

Q. You' re assuming that when they use the word centrum they mean vertebral body?

A. Yes, that's the part that's comminuted.

Q. Is the injury to the C-6 vertebra less and different than at C-5?

A. Yes.

Q. Will you agree that the C-5 vertebral centrum has been impacted and comminuted and fractured into at least four separate and distinct fragments?

A. Yes.

Q. There is an anterior fragment, correct?

A. I believe so.

Q. Well, you've looked at the X-rays and you've offered an opinion here. Was there an anterior --

A. The fragments are all of this anterior -- the main body. Medically we would talk about the body and posterior elements.

Q. Right.

A. So it's the anteriors the front part of the vertebrae that has been crushed down.

Q. Is there an anterior fragment on these four distinct fragments?

A. I believe so. Without seeing the films, I'm not sure or what you're talking about.

Q. Is there a posterior fragment?

A. If there's an anterior and there's two, one's got to be in front of the other, and, therefore, it would be by definition one is anterior and the other is posterior. Is there a fracture through the sagittal plane of the vertebral centrum?

A. Yes, there would be.

Q. And is there a lamina fracture at C-5?

A. Yes.

Q. Could you tell the jury where the lamina are?

A. The lamina -- it would be easier to draw it.

Q. All right, however you'd like to do it.

A. Okay.

Q. Let me see is I can find a marker somewhere.

A. We're looking down. This is "A" for anterior or front, this is "P" for posterior or back, and this is the body, what they're referring to as vertebral centrum.

Damage is in this area in the front. Also, one of these sides of this house, little house that protects the spinal cord has been damaged. There's a laminar fracture. This is the lamina. These are the pedicles. This is the part, you feel the back of your neck, this is what you feel. This has been crushed down, and one of these things has been damaged.

Specifically, now looking at the actual, it's like we're looking this way, we see this body, this part in front has been scrunched. One of the things in back obviously had to have been broken to get loose. The mechanism for this would be flexion, it scrunches it down in the front and pulls apart in the back.

Q. All right. I'll move it for you Doctor. I'll be happy to move that. Thank you.

Now, the anterior, just talking about this anterior fragment, there were lateral views taken on X-ray?

A. Yes.

Q. And could you show the jury what a lateral view is?

A. Well, X-ray would be reported as an anterior posterior view. This would be a front to back view or a back to front view. It can be confusing. The side view, sagittal view, is a laterial view, looking from the side would be looking just that way, looking from the side. That's when the laminar fracture might be more evident. That would be these structures along here.

Q. Okay. Now, the laterla view of the -- will you agree that the lateral view of this anterior fragment shows a bone roughly triangular in appearance and involving --

A. I don't have the films in front of me to -- I certainly have no disagreement with the tremendous, you know, injury that he has had.

Q. I'm just trying to get the mechanical injury here because it's important.

Do you agree or disagree that the anterior fragment, when you look at the lateral view of the x-rays, involves -- is a bone roughly triangular in appearance and involving approximately one half of the vertebral centrum?

A. I don't have the films to --

MR. KRAEMER: Do you have the films? These are the original films?

MR. LEVIN: No, they were copies.

The originals, I think, are required to stay at the hospital.

THE WITNESS: Yes, there is a triangular fragment in front.

BY MR. KRAEMER:

Q. Okay, And does the triangular fragment of that front part involved approximately one-half of the vertebral body?

A. Less than one-half.

Q. Okay. Would you agree that the line of fracture begins at the half way point of the inferior bony plate of C-5 and extends vertically upwards through the centrum and terminates at its superior end plate?

A. Perhaps, yes.

Q. Would you agree that the line of fracture is through and through?

A. Yes.

Q. Would you agree that the anterior fragment has been displaced anteriorly and is free floating beneath the anterior longitudinal ligament?

A. I don't know if it's free floating or not. It certainly has been displaced.

Q. Is it beneath the anterior longitudinal ligament?

A. I can't tell from a plain X-ray. That would be an assumption.

Q. Okay, can some expert tell from a plain X-ray?

A. Not really, no.

Q. Okay.

A. You can see the mechanism of injury is one of amputation of C-4 coming down and chopping off that little piece from C-5.

Q. Let's look at the posterior fragment, do you see that?

A. (No response.)

Q. And I'm talking about the posterior fragment at C-5.

A. Yes.

Q. Will you agree that the posterior fragment is larger than the anterior fragment?

A. Well, yes.

Q. Will you agree that the posterior fragment of C-5 has been compressed, translated posteriorly and rotated?

A. Yes.

Q. Will you agree that the posterior fragment is wedged between the C-4 and C-6 vertebral centrum?

A. Yes.

Q. Will you agree that the displacement of the posterior border or the C-5 vertebra centrum and its corner has disrupted the continuity of the spinal canal?

A. Yes.

Q. Narrowing its diameters and in the process, mechanically traumatizing the spinal cord?

A. Yes.

Q. Now, you never saw the CT scan, so you can't comment on what they show?

A. That's correct.

Q. Now, I want you to assume that the CT scan reveals that the C-5 vertebral centrum has a mid sagittal fracture, does that make -- do you understand what that would be?

A. Yes.

Q. Okay, and that the primarily line of fracture begins at the posterior border and extends in a straight line anteriorly, and the C-5 vertebral centrum is fractured into a right and left half, fracture fragments are nearly symmetrical in geometry and are outwardly displayed.

Can you tell that from looking at any of those films or would you need a CT Scan to show that?

A. It might be more helpful with a CT,

especially in terms of right and left.

Q. Okay, and I want you to be -- and that's because when you're talking a plain X-ray, you're looking this way or front or back?

A. CT is looking down.

Q. And CT, it's almost, if I understand it, it's almost like if you were are cutting it off a tree, level to the ground, and if you can look down and lock at the rings of the tree, is that right?

A. That's why I brought this to show the, that type of view, yes.

Q. Right, but a CT scan just shows thin slices?

A. That's correct.

Q. It's as if you were cutting someone, cutting their head off and then looking at what's left, and then cutting it off a slight bit lower and then locking at what's left?

A. Yes.

Q. But with the modern technology, we don't have to cut someone's head off, but you do it with a machine is that right?

A. Yes.

Q. Insofar as the lamina fractured I'd like you to assume, Doctor, that the

CT scan reveals a through and through oblique fracture in the left lamina.

A. Yes.

Q. Can you tell that from those plain films, or would you need the CT?

A. You can see the lamina fracture in the one of the lateral views.

Q. And is it a through and through oblique fracture?

A. That you'd have to really see the -- the extent of it would be through the CT.

Q. Okay, and you never saw the CT. Now, the C-6 vertebral will you agree that the anterior superior corner of the C-6 vertebral centrum has been evulsed?

A. Yes.

Q. And that evulsion -- what is an evulsion?

A. Torn off.

Q. The part of the bone is actually torn off, is that right?

A. Yes.

Q. Can you show us on the little model where the corner of the C-6 vertebra is torn off?

A. I could really demonstrate all this

to the jury right up against the window as a nature's view box, if you'd like.

Q. Well, it's not necessary. If you just want to point to where we're talking about on this little model.

A. That's just this little top chip locking from the side has been somehow chopped off.

Q. Okay, pulled off, is that what you said?

A. Well, pushed off, I would say, from mechanism.

Q. Will you agree that that evulsion is due to the traction of the anterior longitudinal ligament traction?

A. No, Okay?

Q. Now, there are in between each of these vertebra --

A. The evulsion was due to the downward pressure of the anterior part of C-5. C-4, the lower lip of the C-4 body has served to amputate and cause that main triangular fracture, and that in itself, and the whole compression of these three vertebrae, all right, C-4 squeezing on 5 and 5 pushing on 6 has done that. It's not the ligament. The ligament is still holting onto it. Once it's pushed then the ligament then still is holding it.

Q. Doctor, the way you're holding that

bottled, would you put your hand where the head is.

A. (Witness complies.)

Q. Okay.

A. This person would be looking that way.

Q. Now, correct me it I'm wrong. All right, Doctor, my understanding of the mechanism of a compression injury from a dive into a swimming pool is that the head strikes the bottom and stops but that the center of mass of the person, which is located somewhere around their hips, continues to moved is that correct, is that what happens?

A. That would be in a compression fracture.

Q. Right, and this is a type of compression fracture in this case, isn't it?

A. It is a partial. It would appear to be primarily flexion by the nature of his injury.

Q. But in a diving accident.

A. It's a combination.

Q. -- is that --

MR. LEVIN: I'm sorry, can he finish his answer?

BY MR. KRAEMER:

Q. I'm sorry, go ahead.

A. This particular injury is a flexion and compression injury.

Q. Okay, but when someone dives into a pool and strikes their head, the head becomes arrested, the rest of the -- the mass of the body continues to move forward, and the compression force, whatever compression force there is, is from down here up on the immovable head, isn't that right?

A. No, because there is rotation of the head at that time.

Q. I said the compressive force, whatever compressive force, isn't the compressive force coming from the hips following?

A. It's going both ways. The neck is flexing.

Q. I'm not talking about the flexion. I'm talking about just the compression force, isn't that coming from the weight of the body which continues to move as the head's arrested?

A. That's correct.

Q. Okay, so that when you were holding this, it is not, the compression doesn't come -- you were telling us the compression is coming down. The compression is coming up, isn't it?

A. It',s --

Q. From the hips up, not from the head down?

A. Well, a person is inverted, yes.

Q. Okay, so that, I just, want to make that clear because it looked like you were, suggesting that the compression is coming from the top of the head down. It's actually coming from the center of mass of the body up, isn't that right?

A. Yes, that's correct.

Q. Because the law of physics, as I understand it, is that a body in motion --

MR. LEVIN: I'm sorry, is there a question, Mr. --

BY MR. KRAEMER:

Q. Is it correct that the law of physics, which is involved, is that a body in motion tends to stay in motion?

A. That's part of it.

Q. Right.

A. Unless it's acted upon by another force.

Q. Right, so that what happens is the body is in motions the head stops but the hips want to the keep moving, and they just compress right up the spinal cord right?

A. No, the neck flexes.

Q. I'm just talking about --

MR. LEVIN: Could he just finish one --

BY MR. KRAEMER:

Q. I'm sorry.

A. It's not -- it doesn't just stop and it compresses straight downward. There is flexion that is taking place in that spine at that time. Part oz the force is absorbed by the flexion movement -- flexion moment, actually, is this correct physics term.

Q. Sirs isn't it true that whether there's flexion and when the flexion occurs is determined by the position of the, an alignment of the neck at the time that you impact the bottom of the pool?

A. Certainly, yes.

Q. And isn't it also dependent on the angle at which you impact the bottom of the pool?

A. And the angle which the head started in the first place.

Q. Right, and since you weren't there and Mr. Mooney hasn't told you, you don't know how the -- you personally don't know how the cervical spine was aligned when his head impacted the bottom of the

pool, isn't that right?

A. That's correct.

Q. And you don't know what the position of his torso was, in other words, the spine which is below the necks at the time he impacted that bottom of that pool, isn't that right?

A. That's right.

Q. And you Don't know whether there was flexion before or after, whether the flexion came after the compression or note do you?

A. That's correct.

Q. Okay, Now, you talked about the ligaments, and I think you showed us on that other model. I want to ask you some questions about the ligaments.
In this case, in Mr. Mooney's cased the anterior, would you show the jury the anterior ligament?

A. This is the front, the anterior. Longitudinal ligament would be like a tight band right here in the front. It would be same as if you put a piece of scotch tape about a half inch wide right down the front.

Q. Is that that red thing there?

A. No, this is a --

Q. What's the red thing?

A. It's a neck muscle.

Q. That's your neck muscle?

A. Yes.

Q. So is the anterior longitudinal ligament shown on this model?

A. No, it is not.

Q. Is it shown on any of these anatomical charts? If you tell me, I'll just look for it.

A. I didn't believe that I saw it, no. No, it is not.

Q. And it's not on any charts so we can show the jury what the ligament looks like?

A. No.

THE COURT: Mr. Kraemer, if you're going to be much longer, would this be a good place for a break?

MR. KRAEMER: That would be fine, your Honor.

THE COURT: Let's take about a 15 minute breaK.

THE CLERK: Court is recessed.

(3:40 p.m., Court recessed.)

(4:00 p.m., Court resumed.)

THE CLERK: Court is now session. Please be seated.

THE COURT: All right, Mr. Kraemer,

when you're ready, you may continue.

MR. KRAEMER: Thank you, Your Honor.

BY MR. KRAEMER:

Q. Dr. Kaplan, I thin you told us that the C-5 vertebral body was compressed and there is a minimal forward displacement oz C-5 with respect to C-6 is that correct?

A. It's reported backward displacement. The little Fragment, that triangular piece is forward placed, but the main bone, the whole thing is moved a little backward a little bit.

Q. Which one is moved back, C-5 or C-6?

A. Well, talking about C-6 is in front of C-5.

Q. Okay. Well, which one moved?

A. Probably C-5.

Q. And it moved in what direction?

A. Backwards.

Q. That's your interpretation?

A. Yes.

Q. Okay, and you said it was moved, I think you said, two millimeters?

A. That's what the x-ray report says, yes.

Q. Can you look at x-rays and tell us

how far it's moved?

A. I don't have a ruler.

Q. Well, could you mark --

A. I could show you on window very plainly.

Q. Could you just take, on this piece of paper, could you mark what two millimeters would be, one line and then --

MR. LEVIN: Objection, your Honor.

MR. KRAEMER: -- two millimeters.

THE WITNESS: I cannot do that.

MR. LEVIN: Objection, your Honor, I request if he wants judicial notice of this, the two millimeters, he can demonstrate on a two millimeter rule, not ask him --

MR. KRAEMER: I don't have a two millimeter rule, that's why I wanted the Doctor to --

THE COURT: What did you say, Doctor, you could show --

THE WITNESS: I could show you on the x-ray.

THE COURT: Why don't you do that.

MR. KRAEMER: Thank you, your Honor.

THE COURT: We have a view box here, Doctor, would that help better?

THE WITNESS: On the window, it's closer to show. It's real easy. Nature's own.

THE COURT: (why don't you put the view box in, because they'll have to turn around. I didn't know the box was there or I would have had you set it up before.

THE WITNESS: Okay, this is the top, and this is the bottom, the head and the chest, the teeth and the back of the neck. This is C-5, this is the vertebrae -- excuse me, this is C-4, this is C-5, the vertebrae in question. This little tip, this little, the front, like the beak of this vertebrae has in the flexion moment, when the thing flexed, chopped off the front piece of the C-5 vertebrae. The C-5 vertebrae -- the C-6 vertebrae is also a bit in front. You can see that by looking, this line here, the line of C-5 is approximately two millimeters behind the line of C-5. Specifically showing you with a ruler, it's a little hard because it's not exactly a straight line. but you can see this line here on X-ray behind the line of C-5. Again looking in another marker, these cross markings in the spinous processes, you can see where the C-5 vertebra is behind. By flexion it has squeezed the C-5 vertebrae backwards. C-4 and C-6 have folded in and pushed C-5 backwards.

BY MR. KRAEMER:

Q. When you say backwards, these appear to be further back than this one.

MR. LEVIN: I'm sorry, is it a question?

BY MR. KRAEMER:

Q. Are you saying that --

A. This one is clearly further back than this one.

Q. So C-5 is back further --

A. Yes.

Q. -- than C-4 and C-6.

A. C-6, that's correct.

Q. And two millimeters is the --

A. That's what they have measured it out to be.

Q. And would you agree that that's a minimal displacement?

A. Yes.

Q. Now, again with respect to the, when we took the recess we were talking about the ligamentous structures, there's an anterior and posterior longitudinal ligament?

A. Yes.

Q. And those are supposed to help to keep these bones aligned?

A. They participate. They're part of a total system.

Q. Okay. But their function in the total system is to help to keep them aligned?

A. Yes.

Q. And to add stability?

A. Yes.

Q. And they are, both. the one in the front and the one in the back, the anterior and the posterior longitudinal ligaments in Mr. Mooney are attenuated and disrupted, is that correct?

A. You cannot see it by the films themselves that they're disrupted, at least the plain X-rays. One would assume that based on the other X-rays and perhaps the CT scan.

Q. But would you agree that they are attenuated and disrupted?

A. It would be in keeping with what has happened, yes.

Q. Do you agree that there is loss or integrity to the posterior ligamentous complex interconnecting the posterior portions of the vertebral bodies?

A. Yes, definitely. He was, in common terms, all this means is he was unstable.

Q. Okay. Now, the epiphyseal joints, what's an epiphyseal joint?

A. These joints. I can show you. There are many different joints in the spine. The epiphyseal joints are the joints where the vertebrae come together both above and below. They're lined with synovial fluid like a finger joint and a knee joint. They can be involved in rheumatoid arthritis and things. That are these joints, either side, there's two of them. They're in pairs, okay, here and here and here and here, on either side. Each vertebrae has an upper and lower epiphyseal joint right and left.

Q. All right. Now, in Mr. Mooney's case. the epiphyseal joints at C-4 and C-5 and C-5 and C-3 , at those levels are displaced, is that correct?

A. Yes.

Q. And, I think you agreed that Mr. Mooney sustained an acute unstable cervical spine injury?

A. Yes, sir.

Q. Now. what is to a medical person or a biomechanical engineer, a biomedical engineer, what is direct trauma versus indirect trauma?

A. Well, direct trauma is like being struck on the head by a baseball bat. The direct trauma is what the bat does to the skin and the skull. The indirect trauma would be what has happened when you fall to the ground or what happens to your knees

or your eyeballs should they pop out.

Q. Okay. Now, the type of injury pattern that we've gone through in some detail, all these things that we've talked about, the vertebral bodies, the fragments, the ligaments, the displacement, the epiphyseal joints, the fracture of the lamina, all those resulted from indirect trauma, didn't they?

A. The bony injury as a result of the striking your head, yes.

Q. All right.

A. I don't know whether someone would classify that as direct or indirect.

Q. Well, it isn't the blow to the head, it's the following force of the body which causes the injury, isn't it?

A. It's a combination, yes.

Q. Now, the injury pattern which we've gone, through, can be caused, and to a reasonable degree of medical certainty can be caused by forces initially directed along the longitudinal axis of a straightened cervical spine column in.

Mr. --

A. This --

Q. Is that correct?

A. Potentially it's possible, yeah.

This injury is a flexion -- a flexion, compression injury, though.

Q. Well, the injury, if you had a force which is initially directed along the longitudinal axis or a straightened cervical spinal column, you would see the same injury, same structure damage that you see in this person's X-rays, isn't that right?

A. No, if it was simply a direct axial compression, the answer is no.

Q. Well. I said initially directly. I didn't say that's the total mechanism.

A. It could be.

Q. Okay. Now. is that occurred that you initially had a force applied and the hips continuing to move and the neck was straight, following which and following the fractures, the spine is then flexed, you would see these injuries, wouldn't you?

A. Yes.

Q. And you don't know the -- you personally don't know, because it's outside your expertise, whether Mr. Mooney was on the way down toward the pool bottom when he hit his head, isn't that correct?

A. I do not know.

Q. Okay. And. you don't know whether he, because it's outside your field

of expertise, whether his -- he was changing the position of his head when he impacted the bottom of the pool, isn't that correct?

A. I don't know what his body was doing at that moment.

Q. Okay. And so you can't tell us whether if there was one foot more of water, whatever the depth of the water was, whether it was three feet two inches, three feet four inches, four feet, you can't say whether one foot more of water would have changed the injury in this case, is that right?

A. Oh, yes, I can. That becomes different. When you start talking about depth of water, the medical literature clearly reports, and it doesn't quote the number arbitrarily, it reports that four feet of water is the cut-off. That when you -- that the injuries are -- occur in less than four feet of water. That means that when people are diving, for whatever reason, whatever body position, they don't get the same injuries when they're diving in water four feet or deeper, and they do get them when they're four feet or less.

Q. Now, Doctor, I'm talking about not what you may have read somewhere or somebody else may have told you. I'm talking about your personal knowledge, it is outside your field of expertise as to whether or not if there was three feet of water or

four feet of water, whether you would have had the same injury here, isn't that correct?

A. No, sir.

Q. You've done studies in this?

A. No, it's within my knowledge that water reduces, the drag of the water reduces the impact and lessens the severity of injury.

Q. Doctor. I want to ask this very carefully because it's important, and I want this jury to understand. You've never done any studies, have you?

A. No, sir.

MR. LEVIN: Your Honor, I would object to an argumentative question.

THE COURT: Well, it is getting argumentative.

MR. LEVIN: Is in the face of the premise based upon expert testimony.

THE COURT: There's a difference in asking somebody whether they have some knowledge and then asking them if they've done studies. There's nothing that requires extensive study to have knowledge.

MR. KRAEMER: Your Honor, I said direct knowledge. I didn't say what somebody told --

THE COURT: Even direct knowledge

doesn't have to come from extensive study.

MR. KRAEMER: Excuse me, your Honor, I think --

THE COURT: Hello I'm just pointing out to you why that's argumentative. That's why I sustained the objection to it.

BY MR. KRAEMER:

Q. Let me ask you again, Doctor. Aside from what you may have read, aside from what somebody may have told you, do you have any personal knowledge of whether an additional foot of water would make a difference in this case where you don't know the position of the neck, you don't know the position of the spine, you don't know the trajectory of the dive?

A. No.

MR. KRAEMER: That's all I have. Thank you, your Honor.

THE COURT: Mr. Levin, any other questions?

MR. LEVIN: Just one or two questions.

BY MR. LEVIN:

REDIRECT EXAMINATION:

Q. In terms of personal knowledge, do physicians and experts such as you

in your field rely solely upon that personal experience, or do they also lock at literature of other experts dealing in this field --

MR. KRAEMER: Objection, your Honor.

MR. LEVIN: -- on an ongoing basis,

MR. KRAEMER: I object, your Honor. It's outside the scope of the cross examination.

MR. LEVIN: It's the very last question.

THE COURT: I'll over rule the objection. You may answer that.

THE WITNESS: We rely on a combination of things and our ability assimilate many different sources of information, including information derived from the scientific method. That's obviously the best way within standard medical science. That would mean a controlled study. That would mean, for instance, you would put somebody, have volunteers dive into one foot, two foot three foot, four foot of water and see who gets hurt the most. Obviously, we don't do research like that. Knowledge like that is not obtained. The second way that we obtain knowledge, that I get knowledge is from less scientific things and that becomes anecdotal or statistical studies. These statistical studies show that the deeper the water the safer a person is.

BY MR. LEVIN:

Q. Fair enough. By the way, Doctor, in common medical terminologies that's used in emergency rooms and hospitals, where is the vertex. Would you point to the area considered the vertex?

A. Well, in common usage, it's anywhere from the front of your head to the top and the back of your head.

Q. Thank you. Now, you mentioned the chest abrasions as it was pointed out to you by one of the other examiners. Did you notice in the initial history of the Pocono Hospital record. nose abrasions, as Dennis has told us about earlier?

A. Yes, it says, head, nose, chest.

Q. Head, nose and chest, is that correct?

A. Yeah.

Q. Did I just --

A. I believe it's head and chest, sir.

Q. Head.

A. Head and chest.

Q. Okay. The handwriting is a little difficult to --

A. Oh, I'm sorry. I was reading from the dictated report of Doctor --

Q. But in the handwritten report, would you -- okay, would you read after the word "abrasions" what part of the body relates to as the presence of abrasions?

A. It says. "Abrasion, nasal bridge."

Q. And would you point roughly where that is?

A. (witness indicating.)

Q. Okay. So that as far as the materials reviewed with you by counsel for the defendants, the abrasions, were to the head. nasal bridge and chest, is that correct?

A. Yes.

Q. Now, some point was made about a reiteration in the Pocono Hospital record regarding immediate, a history, is I can have a second.

MR. KRAEMER: Do you want my copy?

MR. LEVIN: what were the magic words, immediate paralysis, right? Thanks.

BY MR. LEVIN:

Q. "He was briefly dazed but remembered immediately sensing numbness and inability to move his extremities," and a great deal was made about that statement. Is there some phenomenon that goes on even in incomplete spinal paralysis immediately upon the first impact?

A. Yes.

Q. What is that phenomenon?

A. Well, the phenomenon is spinal shock.

Q. And what is that?

A. Well, the term that's being used is when the paralysis occurred, which does not speak to the issue of whether it is complete or incomplete. That diagnosis cannot be made immediately, and it cannot be made within the first 24 hours in any event by anyone. The issue of spinal shock means the sudden paralysis that occurs -- it is a major version of what happens if you hit your funny bone. You strike one nerve, you may not move your hand for an instant. when your leg falls asleep for that moment, you cannot walk, you cannot feel anything. The phenomenon of spinal shock means that suddenly all of the nerves just don't work. It relates to an injury, a person will have no motor or sensory function. The spinal cord is damaged at that point. Because of the orthopedic injury, he became unstable and, therefore, subject to further trauma by having his head moved around.

Q. So that any conclusion on the part of whoever it was at Pocono Hospital within that first few hours of complete quadriplegia is what, premature?

A. Well, there is no -- well, there is -- nobody says anything about whether it's complete or incomplete. They're merely saying when it first began.

Q. I see. That's a reference as to time?

A. That's right.

Q. And it's a description or the spinal shock that you're telling us about?

A. That's right. It's not a description or magnitude.

Q. How many children do you and your wife have?

MR. KRAEMER: Objection, your Honor.

THE COURT: Well, I sustained the other objection about his eyes, so I'll sustain the objection about that.

MR. LEVIN: No other questions.

THE COURT: We've tormented the Doctor enough without getting into his kids. Anything else?

MR. LEVIN: No.

THE COURT: Mr. Hanna, do you have a couple others?

MR. HANNA: No. I don't have any questions.

THE COURT: He might have a few more.

MR. KRAEMER: I just have a few, Doctor.

THE COURT: All right.

BY MR. KRAEMER:

RECROSS EXAMINATION:

Q. What is the, and I may not pronounce this correctly, bregma, medical term, b-r-e-g-m-a. do you know what that is?

A. No, I don't. Could I see what context?

Q. If you don't know what it is, I'm not going to --

MR. LEVIN: Your Honor --

MR. KRAEMER: If you don't know what is it, I don't --

THE WITNESS: Is it a what or a who or --

BY MR. KRAEMER:

Q. Excuse me?

A. Is it a person?

Q. No, it's an anatomical term. Are you familiar with it?

A. No, I'm not.

MR. LEVIN: Would you spell it?

MR. KRAEMER: B- r-e-g-m-a.

THE WITNESS: It's not a clinically used term, no, sir.

MR. KRAEMER: Thank you.

THE COURT: Anything else? All right, Doctor, thank you.

MR. LEVIN: Just one final clarification, I'm sorry, your Honor.

BY MR. LEVIN:

REDIRECT EXAMINATION:

Q. The terms that Mr. Kraemer was citing to you and the few that you were unfamiliar with, are these at all terms used by physicians that treat human patients?

A. I've never heard that term before.

MR. LEVIN: Thank you.

That's all, your Honor.

(Witness excused.)

accident. No warnings, fooled him, fooled Brian, caused the accident. Either one of which could have made it happen. Now, we discuss the things that flowed after he was in the pool. A great deal of time, effort, and trouble are spent, we have been told, in training people the correct method of moving injured individuals from pools. Time and again an emergency arises and there has to be a proper method for removing them. This is fundamental. This is not something for highly skilled paramedics. This is something that lifeguards and, indeed, non-lifeguards, people who receive their fundamental life saving badge use in their book. If it that fundamental, it must mean it is common, it is important, and it is something that everyone should be aware of from the very beginning of their training.

At the same time, what does the expert for the pool say? Oh, that's one of those things, yes, they stuck it in there. But we worry about breathing and bleeding. That's it, that's all we worry about. He is the guy that trains people. What do they give you the book for? That's because the book is very very important, and I feel that you might conclude that were he not in the employ of the corporation during his testimony, he might, indeed, have a different opinion. That's up to

you. But, nevertheless, the book that is his bible says it quite clearly.

There is no question they didn't use a back board. They either removed him without the back board picking him up under the armpits, as Brian has said, or if we are to believe Dr. Kazarian, they rammed his head into the side of the pool. That's up to you. I suggest either method was pretty severe in its effect on Dennis.

Dr. Kaplan has given you an opinion that his condition was worsened by the way he was handled. Remember one thing flowed into the next. It is all connected. So if you decide that the measurements had its effect or the lack of warning had the effect, you don't have to worry, really, about the responsibility for the removal, since they were all connected, or not for the defects causing the accident, the removal wouldn't have been necessary. But, nevertheless, the removal was bad.

What is the nature of Defendants' counter to that piece of evidence? They go, and they get a neurologist who does most of his research, according to this testimony, in multiple sclerosis from Jefferson. He is a neurologist, and they put him on the screen, and they asked him, what did he hurt, neck. How did he do it? Hit his head on the bottom. Thank you.

Doesn't it seem strange, here is this professor of eurology, of humans, and for some reason they don't ask him that was the effect of not using a spine board? Why don't they ask? I think you can conclude they don't ask him, because they now that his answer is going to be one that is not going to be very acceptable to them. That he also, as a person who treats humans, is well aware of the importance of immobilizing the spine and is absolutely unable to say, well, it is okay just to pull him out of the pool any way you want.

So they searched and they searched. Now, we are here in Scranton. I am sure there is a competent Board certified neurosurgeon here in Scranton, Wilkes-Barre who could easily stop by and let us know what he thinks. No, they <WPBL> out the Dayton, Ohio, and got this fellow who, I concur, has done a lot of research on crushing bones for pure scientific concern. And I congratulate him on that, and I respect his work as a man who devotes his life to that. And I am sure in terms of ejection seats and parachute openings and things like that he has some knowledge. But they had to go that far to find somebody who would concur with their theory.

Now, here the man comes in and he says, now, I am not a doctor, and I sure don't know anything about water, and I know neck boards are

important, and, yes, you should use them, and I can't comment on it, and I know about the monkey paw, but I can't tell you what the muscles are to open and close the hand, but in my opinion it wouldn't have made a difference. Come on, let's not insult the jury's intelligence. Bring a eurosurgeon in, bring somebody in from one of the many many spinal centers around the country who, like Dr. Kaplan, works in this field, deals with humans, deals with this problem every day, and put him on the stand and ask. They didn't do that. And the answer why didn't they is pretty obvious, because they knew that the answer would be, sorry, friends, you have to be more careful when you pull somebody out of a pool.

Brian says, I asked him, you are talking, aren't you, therefore, you must be breathing. I think two people could have been reassured of that fact, both Dennis and Brian. He could have asked the same question when Dennis was upside down in the water, throw your face up in the water from here. You could determine that Dennis was breathing. He could have said, don't move, Dennis. He would have seen that his request had been complied with. He could have then said, let me see you move your feet. Nothing happened. Let me see you move your hands. Nothing happened. That would have taken to say that six seconds. It didn't happen, folks. Why? Because at that stage of his life, Brian,

although he had the ticket, he was not ready for that level of responsibility, and he shouldn't have been asked to take on that kind of responsibility. But, of course, it was cheaper than hiring somebody older, more experienced, and more mature.

Now, you will be asked about whether Dennis' activities, whether he, himself, contributed to the happening of this accident. I warn you if you find that he is more than percent negligent, he gets nothing. You may in your own wisdom say, well, we are not entirely happy with what Dennis did. You advocate for the corporations for me to really buy what he is selling. That's something you can decide. I suggest to you he has too readily the champion of these corporations. Because I asked him -- he described this horrendous scene inside the spine, which indeed happens. Doesn't this happen in all spinal injuries of the neck? Well, yes, it does. Well, if it happens ("in all spinal injuries of the neck, and we are using the spine board with all spinal injuries of the neck, how does it come to pass there is one particular case, namely the one you are getting paid to come to Court and talk about, it didn't matter. I don't think he had a straight answer for that question, for obvious reasons.

Folks, use your own good common sense. I am not asking for rewards,

we are not asking for unjust payment, but this was an unsafe pool run in an unsafe way. Dennis deserves to be compensated fairly with all the adjustments we discussed. We did not assume the risk, then deny him a penny. He was not a trespasser, he was not more than 51 percent negligent. If you decide he was five or ten percent negligent, whatever your thinking is, that's fair. Thank you very much.

THE COURT: Thank you very much, Mr. Levin.

Members of the jury, you have now heard all of the presentation by the parties in this case and by their lawyers, and it is my job now to give you some final instructions to kind of outline for you what your duties are and to tell you what the

have occurred by way of the conduct of the lifeguard in attempting to remove Mr. Mooney from the pool.

I tried a number of ways last night to design some questions that might be able to put that to the jury in a reasonable and responsible fashion. Those are the two words that I tried to guide myself by.

I reviewed the questions or posed questions that the Plaintiff has submitted to me, and I reviewed in my own recollection and my own notes the testimony and the evidence presented in this case, and I make this determination this morning. As a result of that, I will not submit separate questions on the lifeguard's conduct, as opposed to the initial conduct of the Plaintiff in this case, because of several reasons: A, there is little or no evidence, in my judgment, on separating the injury to the Plaintiff other than one doctor who described some difference between a complete and incomplete spinal injury. B, there is no testimony at all, in my judgment, on which the jury could differentiate the damages to the Plaintiff vis-a-vis his physical condition and vis-a-vis his economic claims. For instance, there is in my finding and judgment no evidence at all which would tell a jury which jobs he could perform if he had only had an incomplete injury or how much he would make, et

cetera, as compared to one with a complete spinal injury.

These are the main items in the case of the Plaintiff, and the lack of definition, of a definitive test could only lead to speculation on behalf of the jury, which would be inappropriate. It is more fair, in my judgment, and this is a finding I make, it is more fair to all to include all of the acts in the concept of negligence, even the concept of comparative negligence and assumption of the risk will work properly, in my judgment, since the guard's conduct would not have happened to all without the Plaintiff's initial conduct.

To try to divide these would cause improper confusion to the jury, and, most importantly, the testimony on the evidence is not sufficiently divided on each subject to allow distinct consideration and verdict by the jury.

That said, I prepared a questionnaire which I would use for the jury. I will give each of the parties here a copy of that. I tried to incorporate in there all of the matters that each of the parties brought to my attention. As you will see, Question No. 1 and Question No. 2 are directed to issues of assumption of risk, and Question No. 3 is directed to the issue of agency, which I see as encompassing the arguments that were made in this case. Question No. 4

and 5 go to the issue of the Plaintiff's burden to prove negligence and causation on behalf of the Defendants. And Questions No. 6 and 7 go to the Defendant's burden to attempt to show negligence and causa on the part of the Plaintiff.

Question No. 8 is the jury's duty under pool was an assumption of a risk, was an assumption of what the Defendants claim was an obvious risk and one that the Plaintiff not only should have but was fully aware of. That's my understanding of the Defendant's position. Am I correct on that? Mr. Hanna?

MR. HANNA: I was getting so much feedback here, I am not sure what he said. But a couple observations, and maybe out of sequence here, having made the comments, the findings that you made with respect to the extrication portion of a claim, it may very well be that it is irrelevant to even argue about it at this point to the jury. The use of the diving back back really is insignificant.

THE COURT: No, I would think that's all encompassed in the Plaintiff's allegations of negligence, was there negligent conduct, was it a continuing process in this case.

MR. LEVIN: That's correct, Your Honor.

MR. HANNA: Anyway, getting back to,

I think I heard your question, there is two parts, the assumption of risk you have to prove risk of danger that was there, and you have to prove that somebody knowingly encountered it. So I have seen interrogatories submitted to a jury where you either use one question or two questions. What you have got here is simply broken the risk of danger and assumption of risk into two parts. If the jury answers there is no risk of danger, then you can't assume of risk.

On the other hand, there has been a lot of testimony that the type of dive that was done and the location in the pool that it was done was very risky. Now, so they could find there is a risk. Then the question of whether he knowingly assume it is a little different. So you have broken it down, and that's certainly a reasonably way to do it.

THE COURT: That was my purpose in doing that.

MR. LEVIN: My concern is that this adapts a characterization of the facts that way only on the side of the Defendant. If we were to say that the preponderance of the evidence that the act of diving in a properly marked pool of the type involved, we would have less to complain about. It is to my thinking, with all due deference to the authors, that it is very one-sided as read. It includes facts that are basically argumentative, in

my opinion.

THE COURT: I use the term type. I tried to make the question as neutral as I could and allow all of you to argue what kind of pool it was. You can include those things in. You, from a Plaintiff's side, as I understand, you will be arguing it not only the markings but the warnings and the configuration of the pool and many other items had to do with whether or not that was an appropriate pool.

MR. LEVIN: If I can, sir, my concern, really, zeros in on the word type. In other words, that has a lot of definitions.

THE COURT: We can change that to say the act of diving into the pool, if you wish. See, my understanding of the defense of this case is that --

MR. LEVIN: That's better, into the pool. Crossing out of the type.

THE COURT: Then you can argue about the type.

MR. KRAEMER: For the purposes of the record, I understand what Your Honor is grappling with, and the only objection I have is that I don't think Question 1 should be asked, because Plaintiff is being permitted to submit an argument this pool should be marked, therefore, he admits and his expert admits that there is a risk associated with

diving into this type of pool. Therefore, I think it is a given that there is a risk. The only issue is whether the Plaintiff voluntarily assumed that risk.

THE COURT: You will note those objections in the record. The only thing I will accede to is the changing of that wording in there. I will change that from the act of diving into the pool involved in this case. We will take the three words "of the type" out.

MR. KRAEMER: Your Honor, I listened as careful as I could to your discussion and ruling on the evidence of aggravation. If the Court has concluded that the evidence is insufficient to submit the issue of aggravation to the jury, then I submit that the issue of the spine board and lack of use of the spine board should not be argued to this jury. Because if there is no evidence from can conclude what the degree of aggravation was, there is no evidence for them to even consider the use or lack of use of the spine board. And I simply point out that even a negligent act without damage is not recoverable, so that the argument shouldn't even be made in this case.

MR. LEVIN: Well, it is all one continuous act. The way you are trying the characterize it, Your Honor, and it is the same people. The Defendant is now trying to go

back to the idea of more than one tort feasor. What happened here is the same group of individuals dealt with him, and they were agents of the same group of Defendants. So throughout this entire event these corporate defendants were acting through their agents. So that the process began when they walked in and relied upon the markings and ended when they put him in an ambulance.

MR. KRAEMER: Your Honor, I think that's the way a layman might want to look at it, but the law looks at it a little bit differently.

THE COURT: I think I understand the position of both parties. We discussed this at length, and my determination on that is based upon what I said. And I wrote it out as carefully as I could, but I can understand the concern of both sides, and I will explain to you again the reasoning for my finding, certainly allowing both sides to disagree with me on the record here.

The reason for my finding is that my judgment in this case is that the Plaintiffs make out an allegation that the continuing conduct of the Defendants was negligent in this case and that it at all contributed in some way to the injuries to this Plaintiff, and, therefore, I will allow that to remain in the case.

MR. KRAEMER: Your Honor, the second point I would make with respect to

that, and I realize how difficult this concept is, and I know you spent a lot of time and took the trouble to write a very reasoned decision as to how you come out on that, but I would like to point out that if one of the Defendants is not the employer or master of these lifeguards, then they could never be found responsible for what the lifeguard did in removing Mr. Mooney from the pool, even if the jury were to speculate or guess that that somehow made him much more seriously injured.

THE COURT: If the jury finds that one or more are not involved, they can do that in Question No. 3

MR. KRAEMER: Except, Your Honor, I think Question No. 3 merely states whether Mountain Leisure Associates was the agent of these three people. The issue of who the lifeguards work for is an open issue in this case, and I request that -- I

(3)

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NO. 92-1032

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC., BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC., and WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOCIATION,

Petitioners

v.

DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT DENNIS MOONEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Court should entertain a Petition for Writ of Certiorari which does nothing more than question a United States Court of Appeals' interpretation of state law in a diversity case on the issue of which party bears the burden of apportioning damages between two events causing injury.

Whether this Honorable Court should entertain a Petition for Writ of Certiorari to review the Court of Appeals' straightforward application of state law in a diversity case where Petitioner has embellished that simple issue with unseemly and uncalled-for attacks upon the Circuit panel and misleading characterizations as a gimmick for manufacturing frivolous seventh amendment issues and invoking this Court's supervisory powers.

Whether this Honorable Court should further entertain a Petition for Writ of Certiorari in this diversity case where the decision of the United States Court of Appeals is not final, but has only resulted in a remand for a partial new trial and for further proceedings on whether sanctions should be awarded to plaintiff as a result of false statements made at trial by counsel for Petitioner's co-defendant that three absent witnesses had been subpoenaed.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Contrary to petitioner's suggestion that the Seventh Amendment to the United States Constitution and Section 1652 of the United States Judicial Code, 28 U.S.C. §1652, are somehow implicated in the matter before the Court, this case involves neither provision for purposes of Rule 24.1(f) or any other purpose. Federal jurisdiction in this matter is based solely on diversity of citizenship pursuant to 28 U.S.C. §1332(a) and no federal question of any conceivable significance is presented.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is no more than a collection of misstatements, inaccuracies and omissions and, as such, is useless to the Court in determining, to the limited degree necessary, the background of the case and the proffered basis for the extraordinary relief being sought.

This diversity case arose from a tragic swimming pool accident on July 12, 1987, at the Wild Acres Country Club, a resort community in the Pocono Mountains in Pennsylvania. Evidence offered at trial showed that on that date, the plaintiff, a twenty year old citizen of the State of New York, while visiting friends at Wild Acres, performed a horizontal, racing-style dive from a place on the pool deck where the depth was marked "four feet." In actuality the pool was only about three feet deep at that location.

As a result of his dive, the plaintiff struck his head on the bottom of the pool and received a fracture to his cervical spine. The plaintiff's evidence at trial showed that after being injured initially as a result of the dive itself, however, he was even more severely injured when the lifeguard on duty negligently brought about his removal from the pool without the use of an available spine board, a device whose very purpose is to help immobilize the victim of a fractured spine in order to help avoid permanent paralysis. In consequence of the injuries caused by the negligent removal of the plaintiff from the pool, the plaintiff has been rendered a quadriplegic for life.

The case was tried to a jury in the United States District Court for the Middle District of Pennsylvania, the Honorable Richard P. Conaboy, Chief Judge, presiding, beginning on November 19, 1990. The plaintiff contended at trial that the defendants were liable for his diving injuries because the pool was unsafe, negligently maintained, lacked necessary warnings against diving, and was dangerously mismarked as to actual depth of water at the point where the dive was attempted. The plaintiff also

separately raised another theory -- that after being injured from the dive the plaintiff was even more severely injured as a result of the lifeguard's negligence in removing him from the pool in a manner contrary to accepted safety standards.

The plaintiff's medical expert, Richard H. Kaplan, M. D., testified at trial that it was his opinion to a reasonable degree of medical certainty that the improper rescue turned an "incomplete spinal injury," from which the plaintiff might have recovered significant use of his arms and legs, into a "complete spinal injury," that is, irreversible quadriplegia. (Petitioner's Appendix at 117-18) Dr. Kaplan clearly differentiated that latter injury from the incomplete spinal injury initially caused by the dive, explaining that an incomplete spinal injury is one in which the victim recovers the use of his arms and legs after a transitional period of paralysis, though not to such a degree that the injury itself is cured. (Petitioner's Appendix at 115-16) Dr. Kaplan also testified, once again to a reasonable medical certainty, that the failure to use the spine board in pulling the plaintiff from the pool was indeed a significant factor in increasing the injury from the status of "incomplete" category to the status of "complete." (Petitioner's Appendix at 117-18)

Elsewhere in Dr. Kaplan's extensive testimony (Petitioner's Appendix at 92-214) he delineated specific quantitative differences in medical costs between the complete injury the plaintiff suffered and the incomplete injury he would have suffered if he had been safely removed from the pool. Taking the future medical expenses for the plaintiff's quadriplegia, he subtracted item by item the costs which the plaintiff would have had if his injury had remained "incomplete." (See Petitioner's Appendix at 160-63) This evidence thus distinguished in the most specific terms between the damages caused initially by the dive and those caused by the improper removal from the pool.

For their part, the Petitioner-defendant responded with expert

medical testimony which did not even address the harm caused by the negligent rescue, but merely asserted that a spinal fracture occurred as a result of the dive. This point was not disputed. A co-defendant, who has not petitioned this Court, provided non-medical expert testimony that the dive itself produced an irreversible injury which alone was responsible for the plaintiff's permanent quadriplegia. This testimony was offered to imply that the process of removing the plaintiff from the pool without a spine board caused no additional harm. The expert, however, was not accepted by the district court as a qualified medical expert.

Defendants argued after the close of evidence at trial that the plaintiff's claim for the aggravation of his injuries by the negligent rescue procedures should be dismissed, not because such a claim had never been raised but because the plaintiff allegedly had failed to meet his supposed burden under Pennsylvania law to "apportion" harm between the initial diving injury and the damage caused in removing the plaintiff from the pool. Notwithstanding the plaintiff's expert medical proof that his "complete spinal injury" was a result of his removal from the pool rather than the dive, the district court adopted the defendants' position in interpreting Pennsylvania law and submitted to the jury, over the plaintiff's protest, a single theory of negligence requiring the plaintiff to prove that the defendants were liable for the original dive itself.

The district court specifically refused plaintiff's proposed jury interrogatories and proposed points for charge, each of which would have informed to the jury that the plaintiff's claim for harm caused by the defendants' negligent rescue after the plaintiff was rendered helpless was not subject to the defense of assumption of the risk. (See Petitioner's Appendix at 65-69)

On November 29, 1990, the jury determined in answer to special interrogatories that, by virtue of his act of diving into the pool, the plaintiff had "assumed the risk." Pursuant to the interrogatories and instructions of

the court, the jury thereby extinguished all avenues of recovery, even recovery for the injuries caused after the dive by the negligent removal of the plaintiff from the pool. A verdict and judgment were thereupon entered in favor of defendants and against the plaintiff. Upon consideration of the plaintiff's post-trial motion, the district court declined to award a new trial, citing specifically its belief that Pennsylvania law had placed upon the plaintiff the burden to apportion the harm caused by the negligent rescue or else suffer loss of that separate claim. (Petitioner's Appendix at 68-69)

The plaintiff appealed to the United States Court of Appeals for the Third Circuit, which, after briefing, extended oral argument and full supplemental briefing on the issue of apportionment, affirmed in part and in part remanded for a new trial. The court of appeals, in interpreting Pennsylvania law, held that the plaintiff's evidence was sufficient to raise a jury question as to whether the alleged negligent rescue had caused the plaintiff's injury. The court of appeals recognized that the jury had never had any opportunity to address this all-important claim.[1]

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[1] The retrial has been scheduled for March 1993; petitioner's petition to the Third Circuit for a stay of remand of the record has been denied.

SUMMARY OF ARGUMENT

This Honorable Court should now decline to grant the Petition for Writ of Certiorari because the issue of state law upon which the court of appeals' decision was clearly and correctly based raises no issue whatsoever concerning federal law. Petitioner has leveled false and unseemly accusations of impropriety against the court in order to manufacture a pretense for the exercise of this Court's certiorari jurisdiction. Petitioner has misstated the theory of the plaintiff's case, the evidence considered by the jury in reaching its verdict, the findings of fact made by the jury, and the controlling state law principles, all in an effort to make this Court believe that a correct decision of state law in a diversity case is somehow a matter requiring the Court's attention. In the final analysis Petitioner's hyperbole and departure from the true record only reveal Petitioner's true desire to escape the risk that a jury, upon considering the plaintiff's negligent rescue claim for the first time, may award money damages to the plaintiff.

The court of appeals properly exercised its appellate jurisdiction, properly reviewed the evidence and correctly applied state law in determining that the plaintiff was entitled to a new trial limited to the issue of "negligent rescue." The court of appeals rightly held that the district court's erroneous formulation of special jury interrogatories had foreclosed any consideration of that theory by the jury.

ARGUMENT

Petitioner posits numerous "questions presented for review" which challenge the judicial integrity of the three-judge panel of the United States Court of Appeals for the Third Circuit in rendering its unanimous decision in this matter -- a decision which the court en banc declined to rehear. In this respect, Petitioner sacrifices the respect owed to that court in the hope of avoiding a jury trial.

Petitioner would have this Court believe that the court of appeals deliberately created its own version of the evidence and invented its own body of law, thereby so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. It is, however, petitioner who has been "inventive" in an effort to create the appearance of irregularity where absolutely none can be found, as the true record so amply demonstrates.

Petitioner's entire argument is based upon two related false premises designed to muddy the clearest waters. These premises are: (1) that the theory of the plaintiff's whole case was "injury on rescue not on dive"; and (2) that the jury considered and rejected the plaintiff's negligent rescue claim unencumbered by any ruling or restriction of the district court, and that the jury made a "finding" that the plaintiff sustained his injuries solely during his dive when his head struck the bottom of the pool rather than during the subsequent rescue. Considering that the district court itself, in its Opinion denying the plaintiff's motion for new trial, acknowledged that the negligent rescue theory was withheld from the jury as a separate claim based on an interpretation of the Pennsylvania law on apportionment, Petitioner's argument is at best untrustworthy.

It is solely upon these distortions that petitioner rests its argument that the court of appeals "negated" the jury's verdict in remanding for a retrial on the negligent rescue claim.

As explained above in respondent's Counterstatement of the Case, the plaintiff's claims were twofold. As the court of appeals correctly stated in its opinion:

> Mooney proceeded at trial on two theories. First, he maintained that the defendants were negligent in failing to provide adequate warning about the depth of the pool area into which he dove. Second, he contended that the incomplete spinal injury that he suffered as a result of the dive became a complete spinal injury when a lifeguard negligently removed him from the pool without using an available spine board.
>
> (Petitioner's Appendix at 3-4)

The jury, moreover, was not permitted to consider the plaintiff's negligent rescue claim independently of the claim for injury caused by the dive itself, and therefore free of the defense that the plaintiff had assumed the risk of diving. As the district court itself acknowledged in its Opinion:

> Mooney suffered his initial injury when he dove into the pool. However, Mooney maintains that his negligent removal from the pool aggravated this initial injury, thereby providing a separate and distinct ground for recovery. Mooney maintains the Court erred in failing to charge the jury that assumption of the risk could not shield the defendants from liability for the negligent removal from the pool.
>
> . . . . We concluded that there was insufficient evidence from which the jury could reasonably apportion the harm. Accordingly, the requested instruction was not given. This decision is consistent with Pennsylvania case

law. See: Martin v. Owens-Corning, 528 A.2d 947: (Where the causes of harm do not lend themselves to separation on any reasonable basis, apportionment by the jury was the result of conjecture and improper.)

. . . .

Applying this standard to the present case, we conclude the record before the court lacked any evidence which would provide a "reasonable basis" for apportioning harm between the initial dive and subsequent rescue. Accordingly, the requested instruction was properly denied.

(Petitioner's Appendix at 65-67, 69)

The court of appeals quite accurately states in its opinion that

[t]he district court declined to permit the jury to consider the negligent rescue claim separately from the issue of liability resulting from the dive because, the court held, the plaintiff had failed to adduce sufficient evidence to differentiate or 'apportion' liability between the two claims. The court therefore submitted the case to the jury on a unitary negligence theory with a set of special interrogatories."

(Petitioner's Appendix at 4)

Directly contrary to petitioner's contention that the district court's special jury interrogatories "put plaintiff's negligent rescue claim to the jury in a reasonable and responsible fashion [,]" the negligent rescue claim was never separately presented to the jury. The court of appeals correctly

discerned in its review of the record that "[b]ecause of the manner in which the case was submitted to the jury, when the jury affirmatively answered the interrogatory regarding assumption of risk, its answer completely interred plaintiff's case. The jury should, however, have been able to consider separately the question whether there was a negligent rescue, the risk of which the plaintiff did not assume." (Petitioner's Appendix at 24-25)

Neither did the court of appeals, as petitioner so boldly suggests, base its conclusion on "invented" testimony not provided by the plaintiff's expert. The record clearly supports the court of appeals' recognition that Dr. Kaplan testified as to his opinion that plaintiff suffered two distinct injuries, a compression injury resulting from the impact of the initial dive, and a flexion injury, resulting from the manner in which plaintiff was rescued. In fact, even petitioner quotes Dr. Kaplan's clear testimony to the effect that failure to use a spine board was indeed a significant factor in causing a complete spinal injury. (Petitioner's Petition at 30)

Contrary to petitioner's distracting and intemperate accusations, the court of appeals did not formulate any legal principles contrary to those established by controlling law, nor did it "invent its own law." The court of appeals simply applied settled Pennsylvania law. The "burden of proof" referred to in Martin v. Owens Corning Fiberglas Corp., 515 Pa. 377, 528 A.2d 947 (1987), and other cases cited by petitioner, is merely the burden of showing that there were, in fact, two injury-producing events. The plaintiff more than satisfied this burden through the expert testimony of Dr. Kaplan that the failure to use a spine board in removing the plaintiff from the pool caused his spinal injury to become "complete," i.e., permanent. The plaintiff never had a burden also to show exactly which among his injuries was caused by the negligent rescue, as distinct from the dive. That is a burden which falls upon the defense. Indeed, in Martin v. Owens-Corning Fiberglas Corporation, supra, 515 Pa. at 381-82, 528 A.2d at 949, the Pennsylvania Supreme Court refused to allow a jury

even to consider reducing an award of damages by apportioning harm between two causes for lung disease -- smoking and asbestos -- where the defendant failed to provide evidence to support such a differentiation.

The court of appeals did not "invent" that proposition but rather correctly stated as a matter of Pennsylvania law which the district court had misapprehended. The court of appeals properly relied on Restatement (Second) of Torts, §433(B)(2) (1965), noting that the Pennsylvania Supreme Court adhered to the Restatement position on apportionment in Martin. (Petitioner's Appendix at 23 and n.5)

Neither did the court of appeals "invent its own law" in declining to follow Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976), a "crashworthiness" products case that turned on New Jersey law and hence was inappropriate in this case to which Pennsylvania law applied.

Finally, the court of appeals panel did not, as petitioner disingenuously suggests, ignore the Third Circuit's decision in Borman v. Raymark Industries, Inc., 960 F.2d 327 (3d Cir. 1992). While the Borman decision, filed one day prior to oral argument in this case, is not mentioned in the court of appeals' opinion, petitioner neglects to point out that the Clerk of the court of appeals specifically required the parties to submit supplemental briefs addressing the effect, if any, of that decision on the issue of apportionment in this case. The Borman case, moreover, merely applied Martin v. Owens-Corning Fiberglas Corporation, supra, a Pennsylvania decision which the court of appeals explored in depth and unquestionably followed in this case.

It is respectfully submitted that it is not now the duty of this Honorable Court to rewrite Pennsylvania law through the vehicle of exercising supervisory power over the court of appeals as requested by Petitioner.

CONCLUSION

WHEREFORE, for all of the above reasons Respondent Dennis Mooney respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 92-1032

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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Bryant v. Girard Bank, 358 Pa. Super.335, 517 A.2d 968, 975 (1986) 7

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) 6, 10, 15

Martin v. Owens-Corning Fiberglas Corp., 545 Pa. 377, 528 A.2d 947, 949 (1987) 7, 9, 10, 13

Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A.2d 745 (1936) 9, 13, 14

Wade v. S.J. Groves, 283 Pa. Super. 464, 424 A.2d 907, n.2 at 907 (1981) 7

REPLY BRIEF FOR PETITIONERS

At trial, petitioner-defendants and their co-defendants contended and provided powerful, convincing evidence that respondent-plaintiff rendered himself a permanent quadriplegic when he executed a running, not a racing, dive contrary to his training and experience that produced his injury when his head violently contacted the bottom of the pool.[1] Plaintiff contended, in the alternative, that liability for the permanent quadriplegia consequent to the dive, which he insisted was a shallow

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[1]Page 5 of respondent-plaintiff's brief in opposition improperly resurrects his attacks against the qualifications and testimony of the defense expert, Dr. Kazarian, which the District Court properly rejected (Appendix to Petition, 69-77), and which plaintiff did not raise in his appeal to the Court of Appeals.

racing dive,[2] rested solely with the defendants because of their negligence in maintaining or marking the pool's water depth, or that the fracture upon contact with the bottom of the pool produced only an incomplete quadriplegia which was aggravated to a complete quadriplegia during the defendant's rescue without using a spine board. The District Court refused to preclude plaintiff's alternative permanency-upon-negligent-rescue claim and allowed all of the parties' contentions to be presented to and decided by the jury (Appendix to Petition, 221-228). Plaintiff argued both aspects of his alternative claims to the jury (215-220). The jury, however, found that the defendants proved by "the

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[2]The evidence underscored that plaintiff would not have hit the bottom of the pool if he had done a shallow racing dive.

fair weight and preponderance of the evidence that the act of diving into the pool involved in this case is one that involves a risk of danger to anyone who engages in that act" and that plaintiff "knowingly assumed such a risk" (43-44).

What the plaintiff's brief in opposition and the Court of Appeals opinion erroneously overlook is that the parties' contentions and the structure of the District Court's special interrogatories posited this threshold factual issue that the jury necessarily resolved in the defendants' favor: did plaintiff's permanent quadriplegia occur when his head hit the bottom of the pool or did it occur when he was being rescued afterwards? In order to conclude that defendants had proven that the "act of diving" involved that risk and that plaintiff had assumed that risk, the jury

had first to find that plaintiff's permanent quadriplegia was caused by his dive and not by the subsequent rescue. If the jury had adopted plaintiff's contentions, it would have answered the two assumption of the risk interrogatories in the negative. That verdict, which the jury did not return, would have required the jury to reject defendants' claim that plaintiff's permanent quadriplegia was caused by the dive and to accept plaintiff's claim that his permanent quadriplegia was not caused by the dive but by the subsequent rescue.

While the Court of Appeals correctly rejected plaintiff's appeal for "a new trial on liability for the dive because of the erroneous readings of the depositions" (30-31), the Court of Appeals exceeded the scope of its appellate powers and violated the

strictures of the Seventh Amendment and this Honorable Court's decision in Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355 (1962), by remanding for a new trial on plaintiff's negligent rescue claim. What plaintiff's brief in opposition and the Court of Appeals opinion erroneously overlook in this regard is that this mandate negates the jury's verdict which placed responsibility for plaintiff's permanent quadriplegia upon plaintiff and which found that this injury was caused by plaintiff's risk-assuming dive and not by the subsequent rescue. The Seventh Amendment and Atlantic & Gulf Stevedores simply do not permit such a fundamentally contradictory re-examination of the facts determined by the jury's verdict.

What plaintiff's brief in opposition and the Court of Appeals opinion also

erroneously overlook is that the new trial mandate compounds this fundamental constitutional error by compelling a new trial, at which the likely verdict is one in favor of plaintiff in contradiction of the verdict originally rendered for defendants,[3] on the basis of legal principles squarely at odds with controlling state law in contravention of the Rules of Decision Act, 28 U.S.C. Section 1652, and Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

On the one hand, shifting the burden of proving apportionment from the party who advocated two apportionable injuries to the parties who did not argue

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[3]In the view of the Court of Appeals opinion, once plaintiff demonstrates two separate injuries, "the burden shifts to the defendants to avoid full liability by apportioning damages and showing that they are responsible only for a given portion of plaintiff's damages....to show which defendants had caused what percentage of Mooney's injuries" (23-24).

apportionment but rather advocated a single, complete injury which was the plaintiff's sole responsibility, runs directly counter to the controlling legal principal that "the burden of proving apportionment rests upon the party seeking it", Martin v. Owens-Corning Fiberglas Corp., 545 Pa. 377, 528 A.2d 947, 949 (1987); Borman v. Raymark Industries, Inc., 960 F.2d 327, 331 (3rd Cir. 1992); see also, Bryant v. Girard Bank, 358 Pa. Super. 335, 517 A.2d 968, 975 (1986); Wade v. S.J. Groves, 283 Pa. Super. 464, 424 A.2d 907, n.2 at 907 (1981).

In Martin, which the Court of Appeals opinion cites, and in Borman, which that opinion does not cite even though known to and specially briefed at the Panel's request, the defendants advocated apportionment, but the courts

refused to allow the juries to consider the claim because the evidence was insufficient to allow apportionment, even though the evidence revealed two causes of the claimed injuries. Contrary to the view presented on pages 11-12 of plaintiff's brief in opposition, those cases do not place the burden of proving apportionment always upon the defendant, nor do they hold that the advocate of apportionment satisfies his "burden of proof" simply by showing the existence of two harms. Rather, the burden was placed upon the defendants in those cases simply because they were the parties seeking apportionment, and the juries were not allowed to provide the claimed apportionment because the advocates failed to adduce sufficient evidence to permit the jury to make the apportionment.

Proof that this analysis, rather than that advanced by plaintiff's brief in opposition and the Court of Appeals opinion, is correct can be found in the Opinion of the Court in Martin. That opinion drew upon the court's earlier opinion in Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A.2d 745 (1936), to formulate, 528 A.2d at 949, and to apply, 528 A.2d at 950, the controlling apportionment principles. As revealed in the quote from Martin at pages 13-14, infra, the Court in Offensend reduced a plaintiff's aggravation award because the expert testimony as to the duration of the aggravation of the pre-existing tubercular condition claimed by plaintiff was insufficient to support the jury's verdict.

Had the Court of Appeals in this case honored its mandate under the Rules

of Decision Act and Erie v. Tompkins, it would have followed Martin and Borman by placing the burden of proving apportionment upon plaintiff, the only party in this case to advocate apportionment. The Court of Appeals exceeded its appellate powers by imposing that burden upon the defendants.

On the other hand, both plaintiff's brief in opposition and the Court of Appeals opinion erroneously fail to recognize that Dr. Kaplan's testimony, as actually provided in the District Court (92-214), rather than as misinterpreted and refashioned by plaintiff and the Panel, falls far short of the required evidence to sustain plaintiff's burden of proving his claim that the impact with the pool produced only a temporary, fully curable injury that was aggravated to a complete, permanent quadriplegia during

the subsequent rescue.

The details of Dr. Kaplan's testimony are accurately delineated at pages 24-34 of the Petition for Writ of Certiorari, and are incorporated here by reference. At this juncture it should be sufficient to note that, first, neither the brief in opposition nor the Court of Appeals opinion provide record page references for their assertion that Dr. Kaplan described two distinct injuries: a compression injury from the dive, and a flexion injury from the rescue (Brief in Opposition, p. 11; Opinion, Appendix to Petition, p. 19), and none can be provided because these statements simply misinterpret what Dr. Kaplan described as the two forces generated simultaneously when plaintiff's head hit the bottom of the pool (112). Second, it is to be noted that Dr. Kaplan testified that it

is "very difficult to predict" the future of an incomplete spinal injury, that the "function can be anything from partial to complete recovery", and that "each case then becomes an individual matter" (116), and that Dr. Kaplan did not explain whether plaintiff's theoretical incomplete injury would have resulted in a partial or a full recovery, or to what degree plaintiff would have remained disabled had a spine board been used. Finally, as to Dr. Kaplan's delineation of damages, it should be noted that his testimony was couched in speculative terms: "I don't know if I could separate that, what -- the medication usage, it could be the same" (160), "It's really hard to say what job he might want and how much help he might need" (162).

Had the Court of Appeals abided by its duties to accurately review the

record and to follow controlling law, it would have found Dr. Kaplan's evidence as insufficient to allow the jury to make the apportionment advocated by plaintiff as the evidence found insufficient in Martin, supra, 528 A.2d at 950 (footnotes omitted):

> The jury, although presented with a great deal of testimony concerning appellant's history and physical condition, was provided no guidance in determining the relative contributions of asbestos exposure and cigarette smoking to appellant's disability. In fact, two experts testified that such a determination was not possible. A situation analogous to the instant case arose in Offensend v. Atlantic Refining Co., supra. There, a jury award of damages for aggravation of an existing tubercular condition was modified (reduced), because the expert testimony did not address the duration of the aggravation. "If the doctors were not in a position to make an estimate of the extent of the aggravation in point of time, the jury should have been allowed to hazard a guess

> beyond the period shown with reasonable certainty." Id., 322 Pa. at 404, 185 A.2d 745. Here, as in Offensend, the jury cannot be expected to draw conclusions which medical experts, relying on the same evidence, could not draw. The causes of disability in this case do not lend themselves to separation by lay-persons on any reasonable basis. Thus, common sense and common experience possessed by a jury do not serve as substitutes for expert guidance, and it follows that any apportionment by the jury in this case was a result of speculation and conjecture and hence, improper. "Rough approximation" is no substitute for justice.

Dr. Kaplan's speculations cannot be regarded as a proper basis for the jury verdict sought by plaintiff.

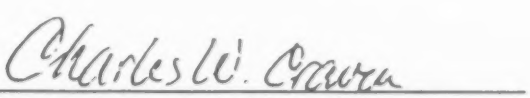
Having chosen to litigate his claims in the federal court system, plaintiff should not now be heard to defer this Honorable Court from exercising its power and fulfilling its duty to ensure that the Court of Appeals comply with federal rights, simply by belittling this case as

a diversity case. Even in a diversity case, a federal appellate court should not be permitted to disregard the rights conferred by the Seventh Amendment, the Rules of Decision Act, Atlantic & Gulf Stevedores, and Erie. Because the Court of Appeals transgressed those rights and exceeded its appellate powers, intervention by this Honorable Court is necessary.

CONCLUSION

For these reasons and those delineated in their petition for writ of certiorari, petitioners respectfully request that this Honorable Court grant the petition, reverse the decision of the Court of Appeals granting a new trial, and reinstate the jury's verdict and the District Court's judgment.

Respectfully submitted,



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